83-372

No. ..-...

IN THE

Supreme Court of the United States

October Term, 1983

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

UNITED STATES POSTAL SERVICE,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.
OR IN THE ALTERNATIVE
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JURISDICTIONAL STATEMENT.

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Questions Presented.

1. Is California prohibited by the doctrine of pre-emption from using its Order To Withhold to garnish the wages of Postal Service employees to collect delinquent income taxes notwithstanding the fact that:
   a. At least seven separate Circuit Courts of Appeal have held that ordinary judgment creditors may garnish the wages of these same Postal Service employees.
   b. The California statute which authorizes said collection (California Revenue & Taxation Code § 18817) pertains only to the collection of *delinquent* income taxes and thus cannot conflict with 5 U.S.C. 5517 which deals with a totally separate area, to wit, the withholding of *current* anticipated tax liabilities.

Parties to This Action.

The parties to this action are:

1. The Franchise Tax Board of the State of California.
2. The United States Postal Service.

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FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

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JURISDICTIONAL STATEMENT.

Appellant the Franchise Tax Board of the State of California appeals from the Opinion of the U.S. Court of Appeals for the Ninth Circuit entered February 10, 1983, or in the alternative respectfully prays that a Writ of Certiorari issue to review that Opinion, which holds that California Revenue & Taxation Code section 18817 is preempted by 5 U.S.C. § 5517 insofar as Revenue & Taxation Code section 18817 allows the Franchise Tax Board to garnish the wages of delinquent taxpayers who are employed by the United States Postal Service.

Appellant the Franchise Tax Board submits this statement to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

Opinions Below.

The Opinion of the Court of Appeals (Appendix A, *infra*) was filed on February 10, 1983, and is reported at 698 F.2d 1029; that Court's Order Amending Opinion and Denying Rehearing (Appendix D, *infra*) was filed on June 3, 1983. The Judgment of the United States District Court for the Central District of

California (Appendix B, *infra*) was entered on July 9, 1980. The Findings of Fact and Conclusions of Law for the Central District of California (Appendix C, *infra*) were filed on August 6, 1980.

Jurisdiction.

The Opinion of the Court of Appeals for the Ninth Circuit was filed on February 10, 1983. A timely Petition For Rehearing And Suggestion That Rehearing Be En Banc was filed on February 24, 1983. The Petition For Rehearing was denied on June 3, 1983.

Appellant filed a Notice of Appeal to the Supreme Court of the United States from the Opinion on August 12, 1983, with the clerk, United States Court of Appeals for the Ninth Circuit. (Appendix E, *infra*.)

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(2).

Such a direct appeal is allowed where a Court of Appeals holds a State statute to be invalid as repugnant to the Constitution, treaties or laws of the United States. Herein the Court of Appeals for the Ninth Circuit held that California Revenue & Taxation Code § 18817 was preempted by 5 U.S.C. § 5517 insofar as it allowed the Franchise Tax Board to garnish the wages of United States Postal Service employees.

This Jurisdictional Statement is filed timely with this Court under the provisions of 28 U.S.C. § 2101(c).

Constitutional Provisions and Statutes Involved.

California Revenue and Taxation Code section 18817 provides in pertinent part:

> "The Franchise Tax Board may . . . require any employer, person, . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer . . . to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate."

California Revenue and Taxation Code section 18818 provides as follows:

"Any employer or person failing to withhold the amount due from any taxpayer and to transmit the same to the Franchise Tax Board after service of notice pursuant to Section 18817 is liable for such amounts."

39 U.S.C. § 401 provides in pertinent part:

"The Postal Service shall have the following general powers:

"(1) to sue and be sued in its official name; . . ."

39 U.S.C. § 410 provides in pertinent part:

"(a) Except as provided . . . or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, . . . employees, . . . shall apply to the exercise of the powers of the Postal Service. . . ."

5 U.S.C. § 5517 provides in pertinent part:

"(a) When a State statute —

(1) provides for the collection of a tax either by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State, or by granting to employers generally the authority to withhold sums from the pay of employees if any employee voluntarily elects to have such sums withheld; and

(2) imposes the duty or grants the authority to withhold generally with respect to the pay of employees who are residents of the State;

the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the State withholding statute in the case of employees of the agency who are subject to the tax and whose regular place of Federal employment is within the State with which the agreement is made.

"(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section."

4 U.S.C. section 106 provides in pertinent part:

"No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

4 U.S.C. § 111 provides in pertinent part:

"The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, . . . or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation."

31 C.F.R. section 215.12 provides in pertinent part:

"Nothing in this agreement shall be deemed:

(a) To require collection by agencies of the United States of delinquent tax liabilities of Federal employees or members of the Armed Forces, or

(b) To consent to the application of any provision of law of the State, city or county which has the effect of:

(1) Imposing more burdensome requirements upon the United States than it imposes on other employers, or

(2) subjecting the United States or any of its officers or employees to a penalty or liability. . . ."

Statement of the Case.

During July and August 1978, the Franchise Tax Board issued to the Postal Service four Orders to Withhold pursuant to § 18817 of the California Revenue and Taxation Code attempting to garnish wages of four of its tax debtors who were employed by the Postal Service. The Postal Service admitted that three of the four tax debtors were employed by the Postal Service. The Postal Service refused to honor the Franchise Tax Board's Orders, contending instead that any funds owed to the tax debtors-employees

were not subject to the Franchise Tax Board's Orders to Withhold.

On December 13, 1978, the Franchise Tax Board filed a complaint against the Postal Service for failure to deliver personal property levied upon. The Franchise Tax Board sought to recover the amount owed by the Postal Service to each of the four tax debtors at the time of the service of the respective Orders to Withhold up to the amount of delinquent taxes owed to the Franchise Tax Board.

In a similar proceeding, in February 1978, the Employment Development Department issued to the Postal Service two Notices of Levy pursuant to § 1755 of the California Unemployment Insurance Code, notifying the Postal Service that two of the latter's mail contractors were delinquent in paying taxes to the Employment Development Department and thereby attempted to levy upon the salary or accounts receivable paid or owed to these two tax debtors by the Postal Service. The Postal Service admitted that the two tax debtors were under contract with the Postal Service for the transport of mail. The Postal Service refused to honor either levy contending that no funds owing to the two tax debtors by the Postal Service were subject to garnishment or levy.

On October 19, 1978, the Employment Development Department filed a complaint against the Postal Service for failure to deliver personal property levied upon. The Employment Development Department sought to recover the amount owed to the two tax debtors by the Postal Service at the time of the service of the Notices of Levy up to the amount of delinquent taxes owed to the Employment Development Department.

On March 23, 1979, the Postal Service filed its Answer to both complaints. On November 1, 1979, the actions were consolidated.

On April 29, 1980, a motion for summary judgment was filed by the Franchise Tax Board and the Employment Development Department. On April 30, 1980, the Postal Service's motion for judgment on the pleadings or in the alternative for summary judgment was filed.

On July 9, 1980, Judgment was entered in favor of the Postal Service and against the Franchise Tax Board and the Employment Development Department dismissing the actions. On August 6,

1980, Findings of Fact and Conclusions of Law were filed by the Court.

On September 2, 1980, the Employment Development Department filed its Notice of Appeal to the Ninth Circuit. On September 3, 1980, the Franchise Tax Board filed its Notice of Appeal to the Ninth Circuit.

The case was argued before a panel of the United States Court of Appeals for the Ninth Circuit on December 8, 1981. On February 10, 1983, the panel issued an opinion (one judge dissenting in part) affirming in part and reversing in part the opinion of the United States District Court. Specifically, the panel reversed the summary judgment of the United States District Court granted against the Employment Development Department and in favor of the U.S. Postal Service, and affirmed the summary judgment of the United States District Court granted against the Franchise Tax Board and in favor of the U.S. Postal Service. The dissenting Judge agreed with the majority opinion which reversed the summary judgment against the Employment Development Department but dissented from the majority opinion which affirmed the summary judgment against the Franchise Tax Board.

A Petition For Rehearing And Suggestion That Rehearing Be En Banc was timely filed by the Franchise Tax Board only. The panel issued an Order Amending Opinion And Denying Rehearing on June 3, 1983.

With regard to the Franchise Tax Board case, the Ninth Circuit Majority Opinion found that the Franchise Tax Board levies were prohibited by 5 U.S.C. § 5517 and apparently also by 31 C.F.R. § 215.12(a). The Majority Opinion did not discuss the decisions from the seven other circuits which have allowed private judgment creditors to garnish the wages of Postal Service employees.

The dissenting Judge in the Ninth Circuit Opinion below stated that 5 U.S.C. § 5517 was a limited waiver of sovereign immunity but that the Postal Reorganization Act waived Postal Service immunity without any qualification regarding state tax procedures. The dissenting Judge went on to point out that the federal courts have consistently held that 39 U.S.C. § 401(1) waives Postal Service immunity from state garnishment proceedings. The Judge concluded that the Franchise Tax Board's Order to With-

hold was essentially a garnishment procedure and he could see no reason why Congress would want to treat the Postal Service employees' tax debts any differently than it treats their other debts.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

I.
INTRODUCTORY STATEMENT.

A majority of the Ninth Circuit panel below has held that California's income tax levy statute, Revenue & Taxation Code § 18817 has been preempted by 5 U.S.C. § 5517 and thus California is prohibited from levying on the wages of United States Postal Service employees to collect delinquent taxes. This is in spite of the fact that the Postal Service honors wage garnishments from ordinary judgment creditors.

The Ninth Circuit panel erroneously has stated that Revenue and Taxation Code § 18817 and 5 U.S.C. § 5517 deal with the same subject matter. Specifically, the Ninth Circuit has held that Revenue and Taxation Code § 18817 which deals with the collection of *delinquent* state income taxes has been preempted by 5 U.S.C. § 5517 which deals only with withholding of *current* anticipated tax liabilities.

The majority Opinion of the Ninth Circuit panel is clearly erroneous and has created an anomalous situation.

This is the first time insofar as the Franchise Tax Board is aware, that any Circuit court has prohibited a levy or garnishment of the wages of Postal Service employees. Although seven separate other Circuit Courts have permitted private judgment creditors to garnish the wages of employees of the Postal Service for payment of *any* debts owed by the employees, the Ninth Circuit panel herein has barred the Franchise Tax Board from using its Order to Withhold to garnish those same wages of those *same* Postal Service employees for payment of state income taxes. In light of the vital importance of the prompt collection of state taxes and the absence of any qualification upon the waiver of sovereign immunity of the Postal Service in 39 U.S.C. § 401 et seq., the majority opinon must be reversed.

The Postal Reorganization Act of 1970 reorganized the functions of what previously was referred to as the United States Post Office into the United States Postal Service. In connection with this reorganization, section 401(1) of the Postal Reorganization Act waived the sovereign immunity of the Postal Service and provided that it may "sue and be sued." The phrase "sue and

be sued" embraces all civil legal proceedings. *General Elec. Credit Corp. v. Smith* (4th Cir. 1977) 565 F.2d 291, 292.

Relying on this waiver of sovereign immunity, at least seven Circuits have allowed ordinary judgment creditors to garnish the wages of Postal Service employees. The Ninth Circuit majority, however, has prohibited the Franchise Tax Board from using its Order to Withhold to levy on the wages of these Postal Service employees. The Ninth Circuit majority has held that the Franchise Tax Board's levy statutes are preempted by 5 U.S.C. § 5517, which statute authorizes the Secretary of the Treasury and the states to enter into contracts whereby federal agencies or instrumentalities agree to withhold current state income tax from the salaries of federal employees. As the Franchise Tax Board will discuss more fully *infra*, 5 U.S.C. § 5517 cannot preempt the Franchise Tax Board levy statutes because 5 U.S.C. § 5517 deals with the withholding of current anticipated income tax liabilities while the Franchise Tax Board levy statutes deal solely with the collection of delinquent taxes.

5 U.S.C. § 5517(b) provides that the United States does not consent to the application of a statute which imposes more burdensome requirements on the United States than on other employers or which subjects the United States or its employees to a penalty or liability because of 5 U.S.C. § 5517, the withholding section.

31 C.F.R. 215.12(a) provides, inter alia, that nothing under the withholding agreements executed pursuant to 5 U.S.C. § 5517 shall require United States agencies to collect delinquent tax liabilities of federal employees.

As the Franchise Tax Board will discuss more fully *infra*, no penalty is being imposed on the United States because of 5 U.S.C. § 5517 which deals with the withholding of current anticipated tax liabilities and the Franchise Tax Board is not using 5 U.S.C. § 5517 to require the Postal Service to collect delinquent taxes. Rather, the Franchise Tax Board is relying solely on its own statutes, Revenue and Taxation Code §§ 18817 and 18818 to require the Post Service to honor its levy for *delinquent*, not current, taxes. This is not prohibited and in fact is mandated by the Postal Reorganization Act which removed the Postal Service

from the political arena and authorized it to act as an independent establishment with powers equivalent to a private business enterprise. (*Beneficial Finance Co. of New York, Inc. v. Dallas* (2d Cir. 1978) 571 F.2d 125, 128.)

The Postal Service was "launched into the commercial world" under the Postal Reorganization Act. (See *Standard Oil Div., American Oil Co. v. Starks* (7th Cir. 1975) 528 F.2d 201, 204; *Goodman's Furniture Company v. United States Postal Serv.* (3rd Cir. 1977) 561 F.2d 462, 464; *May Dept. Stores Co. v. Williamson* (8th Cir. 1977) 549 F.2d 1147, 1148; *Beneficial Finance Co. of New York, Inc. v. Dallas* (supra) 571 F.2d 125, 128.)

The Postal Service is now akin to any other employer in the commercial world and since all other employers are required to honor the Franchise Tax Board's levy, there is no reason in law or policy why the Postal Service should be exempt.

Section 401 of the Postal Reorganization Act of 1970 (39 U.S.C. § 401) waived the Postal Service's immunity from suit. Section 401 provides that the Postal Service may "sue and be sued" in its official name. As stated, at least seven other Circuits have allowed judgment creditors to levy on Postal Service employees' wages.

The only difference between the Franchise Tax Board's levy and that of other general creditors is that the general creditors have obtained a court judgment before they have garnished the employees' wages while the Franchise Tax Board is not required to obtain a court judgment before it can issue a levy to collect its tax. As the Board will discuss more fully, *infra*, after a tax liability has become due and payable (here the taxpayers filed no-remittance returns in which they assessed themselves their tax liability), the Board has the equivalent of a judgment and has all of the remedies of a judgment creditor. Thus it is not necessary for the Board to obtain a court judgment before it levies on the wages of a delinquent taxpayer.

Moreover, the Ninth Circuit has long recognized that the Franchise Tax Board's Order To Withhold is like post-judgment execution. *Randall v. Franchise Tax Board of State of California* (9th Cir. 1971) 453 F.2d 381, 382. In addition, the Ninth Circuit

has expressly rejected the argument that a tax debt must be supported by a court judgment before collection of that debt may be attempted. *Bomher v. Reagan* (9th Cir. 1975) 522 F.2d 1201, 1201-2.

At the outset, it must again be emphasized that 5 U.S.C. § 5517 cannot preempt Revenue and Taxation Code § 18817 because it does not deal with the same subject matter. The collection of current anticipated tax liability through withholding and the collection of delinquent tax liabilities through the garnishment of the tax debtor's wages are two separate procedures. The Order To Withhold authorized by Revenue & Taxation Code section 18817 pertains to the collection of *delinquent* tax liabilities. However, 5 U.S.C. § 5517 is only involved with current anticipated tax liabilities and gives *all* federal agencies the authority to withhold anticipated state income tax liabilities from current earnings. 5 U.S.C. § 5517 provides that the United States is to be treated as any other employer but is not to be subject to a penalty or liability *because of that section*.

Thus, with regard to the withholding of current anticipated tax liability, the United States under 5 U.S.C. § 5517 has waived its sovereign immunity to a limited degree. However, this case does not deal with the withholding of current anticipated tax liability and the Board is not relying on 5 U.S.C. § 5517 to require the Postal Service to remit to the Board the delinquent tax liabilities of Postal Service employees.

In 1978, the Board issued four "Orders To Withhold" to the Postal Service pursuant to Revenue and Taxation Code § 18817. These orders notified the Postal Service that four individual employees were delinquent in paying their California income taxes. The orders constituted levies on any payments (generally salary) owed by the Postal Service to the four employees. The orders attempted to collect *delinquent* income taxes. The orders were not used to collect present estimated tax liability.

The distinction between garnishment of wages to satisfy delinquent tax liabilities on the one hand and payroll withholding to satisfy current anticipated tax liabilities on the other, is crucial. While 5 U.S.C. § 5517 does not *authorize* garnishment of federal employees' wages for delinquent state tax debts, it does not *prohibit* such garnishment if permissible under other statutes (*e.g.*, 39 U.S.C § 401(1)).

The Postal Service has contended below that it cannot honor the Franchise Tax Board's levy because of 31 C.F.R. § 215.12 which states that nothing under the withholding agreements, (executed pursuant to 5 U.S.C. § 5517) shall require United States agencies to collect delinquent tax liabilities of federal employees. However, the Postal Service also admitted at oral argument at the district court level that had the Franchise Tax Board obtained a court judgment, it would have been honored. (Appendix F, *infra*.)

This admission leaves the Postal Service in the untenable position of arguing that it is prohibited from collecting delinquent tax liabilities pursuant to 31 C.F.R. § 215.12, yet admitting that it would honor the Franchise Tax Board levy anyway if the Franchise Tax Board obtained a technical court judgment. There is no logic in this argument.

Furthermore, it is clear that the Board's levy of the wages of Postal Service employees is specifically allowed by 39 U.S.C. section 401(1) which waives the Postal Service's immunity from suit and provides that the Postal Service may "sue and be sued." The Postal Reorganization Act of 1970 completely waived Postal Service immunity without any qualification regarding the collection of delinquent taxes. The Postal Service can "sue or be sued" like a private employer. 39 U.S.C. § 401(1); *See F.H.A. v. Burr* (1940) 309 U.S. 242, 245.

The Board respectfully contends that the majority Opinion has mischaracterized the position of the Board. The Board is not contending that the general waiver of sovereign immunity under 39 U.S.C. § 401(1) overrides 5 U.S.C. § 5517. Rather, the Board has argued that 5 U.S.C. § 5517 only applies to current payroll withholding and by its terms does not prohibit wage garnishment for state taxes provided authority to garnish exists under the provisions of other statutes. Two separate sovereign immunities are involved in this case — 5 U.S.C. § 5517 and 39 U.S.C. § 401(1). The Board has pointed out that the sovereign immunity which was waived to a limited degree in 5 U.S.C. § 5517 applied to *all* federal agencies and pertained only to current payroll withholding of state taxes for those agencies. However, the sovereign

immunity which was waived in 39 U.S.C. § 401(1) is a *general* waiver of sovereign immunity which applies only to the Postal Service. This general waiver has been interpreted by Circuit Courts in at least seven of the Circuits as permitting garnishment of Postal employees' wages. There is no qualification on this waiver of sovereign immunity. Moreover, there is no qualification or limitation on the type of debts which can be garnished from Postal employees' wages.[1] Logically speaking, there is no reason to treat Postal employees' commercial debts any differently than their tax debts. Indeed, the majority Opinion has placed these tax debts on a lower plane than commercial debts which is completely contrary to long established authority.

There is also a serious question whether 5 U.S.C. § 5517 even applies to the Postal Service in light of 39 U.S.C. § 410 which provides in pertinent part as follows:

> "Except as provided . . . or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts . . . employees . . . or funds . . . shall apply to the exercise of the powers of the Postal Service."

The Ninth Circuit panel found that the Postal Service did continue to honor the withholding contracts. The Board respectfully contends, however, that this voluntary compliance cannot be used by the Postal Service to preempt California statute to cause California's statute to be preempted.

It must be kept in mind that the Board is not seeking to impose a tax on the Postal Service. It is merely seeking to collect a valid income tax from the Postal Service employees by having the

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[1]Compare 38 U.S.C. § 1820(a)(1) which includes a "sue and be sued" clause applicable to the Veteran's Administration. Following a district court decision upholding wage garnishments under that statute against VA employees, the statute was amended to "qualify" the "sue and be sued" clause explicitly stating that wage garnishments were not permitted under the authority of that statute. *See, May Dept. Stores Co. v. Smith* (8th Cir. 1978) 572 F.2d 1275, 1277 cert. denied (1978) 439 U.S. 837.

Obviously, if a qualification of the Postal Service's "sue and be sued" clause was intended for tax debts, Congress could have so amended 39 U.S.C. § 401(1).

Postal Service transmit *property belonging to the tax debtor-employees* to the Board. The distinction between the taxation of private interests and the taxation of governmental interests is fundamental in the application of the intergovernmental immunity doctrine. *U.S. v. Allegheny County* (1944) 322 U.S. 174, 186. The "legal incidence" of the Board's tax is clearly upon the employees under the principles recently set forth in *United States v. Mississippi Tax Comm'n* (1975) 421 U.S. 599, 608. The mere fact that collection of the tax is being attempted from property belonging to the employees and held by the Postal Service does not alter this result.

The Board believes this matter is appropriate for hearing by this Court. The exceptional importance of the collection of state taxes is not a matter which should be lightly cast aside. In the absence of a federal statute which explicitly prohibits garnishment of wages of Postal employees for state tax debts, this vital means of collection of these liabilities must be preserved not only for California but also for any other state in which Postal employees reside.

The State of California has a vital interest in collecting taxes from its taxpayers. This vital interest which is shared by all other states and taxing authorities was recognized long ago by this Court in *Dows v. City of Chicago* (1870) 78 U.S. (11 Wall.) 108, where a National Bank tried to restrain the collection of a tax levied by the City of Chicago upon the bank's capital shares. This Court decided that no court could enjoin the collection of the tax, and stated as follows:

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." (*Dows, supra*, 78 U.S. at 110.)

This Court also stated that "[T]he prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government." (*Springer v. United States* (1880) 102 U.S. (12 Otto) 586, 594), and that "taxes are the life-blood of government, and their prompt and certain availability an imperious need." (*Bull v. United States* (1935) 295 U.S. 247, 261;

Accord *G.M. Leasing Corp. v. United States* (1977) 429 U.S. 338, 350.)

In all, the anomalous situation which the majority Opinion has created is simply unsupported by the record and the law. 5 U.S.C. § 5517 and 39 U.S.C. § 401(1) can peacefully coexist.[2] Wage garnishments for state tax debts of Postal employees simply do not run afoul of § 5517 because they are authorized by 39 U.S.C. § 401(1).

To summarize, the Franchise Tax Board believes that this Court should note probable jurisdiction and allow full briefing and oral argument for the following reasons:

1. The Postal Reorganization Act waived generally the sovereign immunity of the Postal Service. At least seven other Circuits have held that ordinary judgment creditors may garnish the wages of Postal Service employees. As such the Franchise Tax Board should be permitted to use its Order to Withhold to garnish the earnings of the employees of the Postal Service.

2. The collection of state taxes is a matter of extreme importance. Before an infringement upon that vital right may be permitted, it must be clearly demonstrated that indeed a federal statute such as 5 U.S.C. § 5517 was intended to expressly *limit* that right. However, in this instance, § 5517 was not intended to limit the collection of state taxes; rather it was meant to facilitate that collection through payroll withholding. Contrary to

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[2]Compare an analogous situation where the Postal Service argued *unsuccessfully* that 42 U.S.C. § 659 (statute authorizing wage garnishment for alimony and child support debts for all federal employees) barred garnishment of Postal employees' wages for commercial debts. In *Iowa-Des Moines Nat. Bank v. United States* (S.D. Iowa, 1976) 414 F.Supp. 1393, the Court held that since the Postal Service had already consented to "sue and be sued," in 39 U.S.C. § 401(1), the consent of the United States in 42 U.S.C. § 659 (for alimony and child support debts) is *superfluous* insofar as garnishments against the Postal Service are concerned. 414 F.Supp. at 1397.

Similarly, 5 U.S.C. § 5517 may well be *superfluous* insofar as the Postal Service is concerned since all that statute is imposing upon the Postal Service is the duties and responsibilities required of any private employer. The same can be said for California Revenue & Taxation Code section 18817.

the majority Opinion, § 5517 was not intended to restrict the collection of delinquent state tax liabilities where such collection is authorized under the provisions of another Act of Congress such as 39 U.S.C. § 401(1). The Franchise Tax Board seeks only to be permitted to treat the Postal Service as it would a private employer or enterprise. In light of the Postal Reorganization Act such a treatment is completely warranted if not mandated.

3. The majority Opinion has created an anomalous situation where the Order to Withhold is not being honored to collect the tax debts of Postal employees yet garnishments to collect commercial debts are being honored. This is completely unwarranted and in fact conflicts with longstanding authority regarding the preeminence of tax debts.

4. The majority Opinion has disregarded the Postal Service's concession that garnishment of Postal employees' wages was permissible, even in light of their 5 U.S.C. § 5517 argument, if the Board obtained a court judgment for taxes. This admission means that the Franchise Tax Board cannot be preempted by 5 U.S.C. § 5517.

5. Finally, as Postal employees reside and are required to pay state and local taxes not only in California but also in virtually all of the States, the problem of how to collect these delinquent liabilities is not exclusive to California.

II.

CALIFORNIA'S LEVY STATUTE IS NOT PREEMPTED BY 5 U.S.C. § 5517.

A. Wage Garnishment and Payroll Withholding Do Not Involve the Same Subject Matter.

In reaching its conclusion that 5 U.S.C. § 5517 preempts the Board's wage garnishments under California Revenue & Taxation Code § 18817, the majority opinion has incorrectly stated that §§ 5517 and 18817 deal with the same subject matter. However, 5 U.S.C. § 5517 is only involved with payroll withholding of current anticipated tax liabilities. It neither prohibits nor permits wage garnishment of delinquent tax liabilities. Section 18817 is only involved with the collection of delinquent tax liabilities. The State of California has a full scheme of payroll withholding statutes patterned after the Internal Revenue Code designed for the

collection of current anticipated tax liabilities. Section 18817 is not part of that scheme.

5 U.S.C. § 5517 was enacted originally in 1952 as 5 U.S.C. § 84b. It was enacted in order for the federal government to cooperate with state tax wage withholding programs with respect to federal employees. In fact, the Congressional debate with regard to § 5517 made it clear that it has been the longstanding policy of Congress "not to interfere with the enforcement or collection of state income tax laws." *Lung v. O'Cheskey* (D.N.M. 1973) 358 F.Supp. 928, 932, Affirmed (1973) 414 U.S. 802.

The legislative history of 5 U.S.C. § 5517 is clear that current payroll withholding akin to the income tax withholding provisions of the Internal Revenue Code (codified at 26 U.S.C. §§ 3401 et seq.) was the sole aim of the legislators. The following statement by Representative Prouty, from Vermont, is illustrative: "The enactment of S. 1999 would accord to the States the same cooperation in tax collections which the Federal Government demands from them . . . and therefore increase the revenue of State governments, lessening their dependence on the Federal Government and strengthening our system of duality of sovereignty." (98 Cong. Record-House 9374 (1952).)

Furthermore, the legislative history indicates that Section 5517 was enacted because Congress believed that without the statute, federal agencies lacked authority to withhold state income taxes from the wages of their employees. *See*, 98 Cong. Record-House 9374 (1952); Sen. Rept. No. 1309 reprinted in 2 U.S. Code Congressional and Admin. News 2360 (1952); House Rept. No. 2474 reprinted in 2 U.S. Code Congressional and Admin. News 2434 (1952). As such, section 5517 was a limited waiver of sovereign immunity for *all* federal agencies solely in the area of payroll withholding of current anticipated tax liabilities.

The Ninth Circuit's holding that current withholding and levying statutes cover the same subject matter is erroneous. Payroll withholding under California Law is a relatively recent phenomenon in that it was not until 1972 that it commenced with respect to California residents. California Revenue & Taxation Code section 18806 (as it read prior to 1980 repeal and reenactment). On the other hand, the Franchise Tax Board's garnishment pro-

vision under § 18817 has been in existence for some forty years. Currently, payroll withholding is administered by the Employment Development Department and the pertinent statutes are now found in California Unemployment Insurance Code § 13000, et seq. Moreover, wage garnishments for taxes are now controlled by provisions of California Code of Civil Procedure § 723.070, et seq. This plainly indicates that the placement of the prior California payroll withholding provisions (§§ 18805-18816) under the same Article and Chapter of the California Revenue and Taxation Code as the prior garnishment provisions (§§ 18817-18819) simply does not mean that they involve the same subject matter.

To further demonstrate the diverse nature of payroll withholding and wage garnishment it should be noted that federal payroll withholding and federal wage garnishments for taxes do not appear in the same Subtitle much less same Chapter of the Internal Revenue Code. The payroll withholding provisions can be found at 26 U.S.C. § 3401, et seq. These provisions are located in Chapter 24 of Subtitle C of the Code. However, the Internal Revenue Service's wage garnishment provisions are found in Chapter 64 of Subtitle F at 26 U.S.C. § 6331, et seq. The California payroll withholding and garnishment provisions were patterned after the Internal Revenue Code.

With regard to *withholding*, compare:

1. California Revenue & Taxation Code § 18806 (the former withholding statute)

2. California Unemployment Insurance Code §§ 13020-13031 (the present withholding statutes)

3. 26 U.S.C. § 3402 (the present Internal Revenue Service withholding statute)

With regard to the definition of wages, compare:

1. California Revenue & Taxation Code § 18807 (the former statute)

2. California Unemployment Insurance Code § 13009 (the present statute)

3. 26 U.S.C. § 3401(a)

With regard to *garnishment*, compare:

1. California Revenue & Taxation Code § 18817 with 26 U.S.C. § 6331(a) & (d) (authorization to levy)

2. California Revenue & Taxation Code § 18818 with 26 U.S.C. § 6332(c)(1) (liability for failure to honor levy)

3. California Revenue & Taxation Code § 18819 with 26 U.S.C. § 6332(a) & (d) (Prohibition of liability to delinquent taxpayer for complying with levy)

As the Franchise Tax Board has stated, 5 U.S.C. § 5517 applies *only* to wage withholding of state taxes. It does not apply to the collection of delinquent tax liabilities nor does it apply to any other collection remedy possessed by the Board.

It is at this point that the nature of the Postal Service becomes important. It has been unanimously held by every federal court of appeal which has considered the issue, that the Postal Service's sovereign immunity was generally waived by the Postal Reorganization Act of 1970 (Public Law 91-375, codified at 39 U.S.C. § 101, et seq.). *Beneficial Finance Co. of New York, Inc. v. Dallas* (2d Cir. 1978) 571 F.2d 125, 127-8. Therefore, unlike other federal agencies which will retain their sovereign immunity (other than that which was waived by 5 U.S.C. § 5517), the Postal Service is amenable to the use of the other state tax collection devices mentioned above.

In the instant matter, the Board has utilized its Order to Withhold which is like post-judgment execution. *Randall v. Franchise Tax Board* (9th Cir. 1971) 453 F.2d 381, 382. The Order to Withhold, unlike the wage withholding provisions of 5 U.S.C. § 5517, reaches "any credits or other personal property or other things of value, belonging to a taxpayer." California Revenue and Taxation Code § 18817. The Order To Withhold is a collection device which can be used to collect delinquent tax liabilities. The wage withholding provisions of 5 U.S.C. § 5517 cannot be so used. *See*, 31 C.F.R. § 215.12. The Postal Service has attempted to extend 5 U.S.C. § 5517 far beyond its legislative intent. 5 U.S.C. § 5517 pertains only to payroll wage withholding and has no applicability with respect to the collection of delinquent tax liabilities.

Plainly, the majority's analysis in attempting to find a conflict between 5 U.S.C. § 5517 and California Revenue & Taxation

Code § 18817 is faulty. Payroll withholding is not the same as wage garnishment. Section 5517 does not deal with wage garnishment nor does it purport to prohibit wage garnishment for federal employees where such is authorized under some other statute.

B. As There Is No Actual Conflict Between 5 U.S.C. § 5517 and California Revenue and Taxation Code Sections 18817-18818, the Supremacy Clause Does Not Bar the Board's Action Herein.

One critical preliminary question which must be answered in any matter when the preemption of state statutes by federal statutes is alleged is whether there really is a conflict between the statutes. It is the Board's position that a close scrutiny of 5 U.S.C. § 5517 will reveal that no conflict exists.

The Board is *not* seeking to impose any liability upon the Postal Service because of the latter's failure to abide by 5 U.S.C. § 5517. Additionally, the Board is not seeking to require collection of delinquent tax liabilities under authority of the 5 U.S.C. § 5517 wage withholding agreement. That agreement has *nothing* to do with whether the Board can collect delinquent tax liabilities through its Order to Withhold statutes.

In deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause, it is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question of whether they are in conflict. *Perez v. Campbell* (1971) 402 U.S. 637, 644. The court's function is to determine whether a challenged state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines. v. Davidowitz* (1941) 312 U.S. 52, 67; Accord, *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 526; *Ray v. Atlantic Richfield Co.* (1978) 435 U.S. 151, 158. An unconstitutional conflict will be found where compliance with both the federal and state statutes is a physical impossibility. *Florida Growers v. Paul* (1963) 373 U.S. 132, 142-3.

It will *not be presumed* that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so, since the exercise of

federal supremacy is not lightly to be presumed. *Schwartz v. Texas* (1952) 344 U.S. 199, 202-3. Conflicts between state and federal statutes should *not* be sought out where *none clearly* exists. *Seagram & Sons v. Hostetter* (1966) 384 U.S. 35, 45, reh. den. (1966) 384 U.S. 967.

Subdivision (b) is the portion of 5 U.S.C. § 5517 which the Ninth Circuit majority found to conflict with California Revenue and Taxation Code §§ 18817. It provides in pertinent part:

> "(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section."

It is clear that *identical* requirements are imposed upon *all* employers under California Revenue and Taxation Code §§ 18817-18818. No distinction is made between the United States and other employers. Thus, the first part of 5 U.S.C. § 5517(b) is not violated. Cf. *Clincher v. United States, States of Montana & Arizona* (Ct. Cl., 1974) 499 F.2d 1250, 1253-4, cert. denied (1975) 420 U.S. 991.

The second phrase in 5 U.S.C. § 5517(b) ("or which subjects the United States or its employees to a penalty or liability *because of this section*") (Emphasis added) is also not in conflict with §§ 18817-18818 because of the proviso "because of this section" included therein. The Board is *not* suing for violation of the agreement set forth in 5 U.S.C. § 5517. It is suing for violation of § 18817 under the authority of § 18818. No penalty or liability because of 5 U.S.C. § 5517 is being sought. Accordingly, no conflict between state and federal statutes clearly exists in this matter and none should be sought out. *Seagram & Sons, Inc. v. Hostetter, supra*, 384 U.S. 35, 45 reh. denied (1966) 384 U.S. 967. Moreover, there is absolutely no physical impossibility of being able to comply with both the federal and state statutes. *Florida Growers v. Paul, supra*, 373 U.S. 132, 142-3. Finally, as Congress enacted 5 U.S.C. § 5517 in order to *cooperate* with state tax collection it cannot seriously be contended that § 18817 stands as an obstacle to the accomplishment and execution of these cooperative purposes and objectives of Congress. See 2 U.S. Code Congressional & Administrative News pp. 2360-1,

2433-4; *Hines v. Davidowitz, supra*, 312 U.S. 52, 67.

A further indication of the absence of any real conflict can be perhaps best found in the oral argument at the District Court level of counsel for the Postal Service wherein he stated that if the Board took the additional step and obtained a *judicial* garnishment, all obnoxious elements in the Board's tax collection procedures would be eliminated. (Appendix F, *infra*.) This elimination of the alleged conflict would occur because there would be less likelihood of the *volume* of judicial tax garnishments as opposed to administrative tax garnishments. (Appendix F, *infra*.) To find that an actual conflict between statutes exists at the *whim* of the Postal Service is plainly in error.

III.

THE POSTAL SERVICE IS NOT IMMUNE FROM THE FRANCHISE TAX BOARD'S TAX COLLECTION PROCEDURES.

Due to the Postal Reorganization Act of 1970, Federal Courts of Appeal in *seven* of the Circuits have expressly held that the Postal Service is not immune from state garnishment or other related proceedings. *Kennedy Elec. Co., Inc. v. United States Postal Serv.* (10th Cir. 1974) 508 F.2d 954, 960; *Standard Oil Div., American Oil Co. v. Starks* (7th Cir. 1975) 528 F.2d 201, 204; *May Dept. Stores Co. v. Williamson* (8th Cir. 1977) 549 F.2d 1147, 1149; *Goodman's Furniture v. United States Postal Service* (3rd Cir. 1977) 561 F.2d 462, 465; *General Elec. Credit Corp. v. Smith* (4th Cir. 1977) 565 F.2d 291, 292; *Beneficial Finance Co. Of New York, Inc. v. Dallas* (2nd Cir. 1978) 571 F.2d 125, 127-128; *Assoc. Financial Services of America v. Robinson* (5th Cir. 1978) 582 F.2d 1. In addition, the United States Court of Claims has agreed with these decisions and has held that section 401 of the Postal Reorganization Act (39 U.S.C. § 401) waives the Postal Service's immunity from suit. *Coley Properties Corp. v. United States* (Ct. Cl. 1979) 593 F.2d 380, 387. The Ninth Circuit has also stated in dicta in a recent decision that section 401 above may now permit suits against the Postal Service that were prohibited against its predecessor, such as garnishment proceedings. *Sportique Fashions, Inc. v. Sullivan* (9th Cir. 1979) 597 F.2d 664, 665-666, fn. 2. As far as the Board is aware, *no* Circuit before this decision of the Ninth Circuit has

ever held that the Postal Service is immune from state garnishment and other related proceedings.

In the instant case, the Postal Service has put forth many sovereign immunity contentions identical to those put forth previously by the Postal Service which have been uniformly rejected by *every* Federal Court of Appeal which has considered the issue. Although the Postal Service contended at trial that it was not relitigating the "sue and be sued" clause of 39 U.S.C. § 401(1), every single argument espoused by it was nothing more than an indirect attempt to relitigate the question whether Congress really waived the sovereign immunity of the Postal Service when it enacted Public Law 91-375 in 1970.

The above cited Postal Service garnishment cases should dispose of the instant action favorably to the Board due to the fact that the primary difference between the above cited cases and the instant one is that no state court judgment has been obtained by the Board. However, unlike other civil actions, summary collection procedures to collect delinquent *taxes* are constitutionally permissible. No "judgment" of any kind is necessary. *Phillips v. Commissioner* (1931) 283 U.S. 589, 596-7; *Bull v. United States* (1935) 295 U.S. 247, 260; *G.M. Leasing Corp. v. United States* (1977) 429 U.S. 338, 352 fn. 18; *Scottish Union & Nat. Ins. Co. v. Bowland* (1905) 196 U.S. 611, 632; *Bomher v. Reagan, supra* (9th Cir. 1975) 522 F.2d 1201, 1202. The Board has the status of a judgment creditor and is entitled to all of the remedies associated therewith. California Code of Civil Procedure § 688.020(a); see also, *Randall v. Franchise Tax Board of State of California* (9th Cir. 1971) 453 F.2d 381, 382; *Kelly v. Springett* (9th Cir. 1975) 527 F.2d 1090, 1094; *Aronoff v. Franchise Tax Board of State of California* (9th Cir. 1965) 348 F.2d 9, 10-11; *C.I.T. Corporation v. United States* (N.D. Calif., 1972) 344 F.Supp. 1272, 1276; *United States v. Fisher* (N.D. Calif., 1948) 93 F.Supp. 73, 75-76.

Therefore, as other judgment creditors would be permitted to sue the Postal Service for failure to honor garnishment requests under 39 U.S.C. § 409(a), the Board should likewise be permitted to do so in these actions.

It must be recognized that the waiver of immunity provided for in 39 U.S.C. § 401(1) is not limited. There was no qualifi-

cation upon the Postal Service's amenability to process in the statute. The phrase "sue and be sued" *embraces all civil legal proceedings. General Elec. Credit Corp. v. Smith, supra*, 565 F.2d 291, 292.

This Court's holdings in the trilogy of cases, *Keifer & Keifer v. R.F.C.* (1939) 306 U.S. 381; *F.H.A. v. Burr* (1940) 309 U.S. 242 and *R.F.C. v. Menihan Corp.* (1941) 312 U.S. 81 are controlling. In those cases, this court stated:

> "[T]he government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." *Keifer & Keifer v. R.F.C., supra*, 306 U.S. 381; 388.
>
> "[I]t must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued', that agency is not less amenable to judicial process than private enterprise under like circumstances would be." *F.H.A. v. Burr, supra*, 309 U.S. 242, 245.
>
> "[T]he words 'sue and be sued' normally include the natural and appropriate incidents of legal proceedings." *R.F.C. v. Menihan Corp., supra*, 312 U.S. 81, 85.

If a private employer or enterprise acts in violation of California Revenue and Taxation Code §§ 18817-18819, the Board could institute legal action against that private employer or enterprise to recover the amounts not transmitted to the Board. As the Postal Service was "launched into the commercial world," under the Postal Reorganization Act (see *Standard Oil, supra*, 528 F.2d 201, 204; *Goodman's, supra*, 561 F.2d 462, 464-465. *May Dept. Stores, supra*, 549 F.2d 1147, 1148; *Beneficial Finance, supra*, 571 F.2d 125, 127-128), there is clearly no basis in law or policy for blocking the instant action wherein the Postal Service has acted in violation of the above sections. The Postal Service is simply not immune from the Board's tax collection procedures. Furthermore, to sustain the Postal Service's position in these cases would be contrary to the prohibitions of 28 U.S.C. § 1341 which provides that no District Court shall enjoin the assessment, levy or collection of a tax.

IV.

THE BOARD MAY INSTITUTE TAX COLLECTION PROCEEDINGS WITHOUT OBTAINING A STATE COURT JUDGMENT PRIOR THERETO.

At the oral argument of the cross motions in the instant matter, it was stated by counsel for the Postal Service that had the Board obtained a technical state court "judgment" and levied on that "judgment," the Postal Service would have honored that levy. (Appendix F, *infra*.) However, counsel for the Postal Service contended that administrative levies or garnishments such as the Board's Orders to Withhold would not be and are not being honored because the Postal Service believes there is no determination of liability in these instances. (Appendix F, *infra*.) The Postal Service's statements are completely erroneous and fly directly in the face of long-standing and well established authority upholding the validity and constitutionality of summary tax collection procedures.

As shown in argument III above, summary administrative proceedings to collect taxes have been consistently upheld by this Court. *Phillips v. Commissioner, supra*, 283 U.S. 589, 596-7; *Bull v. United States, supra*, 295 U.S. 247, 260; *Scottish Union & Nat'l. Ins. Co. v. Bowland, supra*, 196 U.S. 611, 632; *G.M. Leasing Corp. v. United States, supra*, 429 U.S. 338, 352 fn. 18. A tax assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt. *Bull v. United States, supra*, 295 U.S. 247, 260; quoted with approval in *G.M. Leasing Corp. v. United States, supra*, 429 U.S. 338, 352, fn. 18. The underlying rationale for approval of the summary procedures is that the very existence of government depends upon the prompt collection of the revenues. *Ibid.* As long as there is an adequate opportunity for a post-seizure determination of the taxpayer's rights, the statute authorizing summary collection procedures meets the requirements of due process. *Phillips v. Commissioner, supra*, 283 U.S. 589, 596-597. A suit for refund is an adequate alternative means of subsequent judicial review. *Id.*, at 597-598.

The Board's tax collection procedures conform to the standards set forth above by this Court. In this case, collection of delinquent

taxes is permitted without obtaining a state court judgment prior thereto. The taxpayer has available to him or her subsequent judicial review in the form of the suit for refund procedure. California Revenue and Taxation Code §§ 19081-19092.

A. The Board's Procedures.

In this matter, each of the four tax debtors filed personal income tax returns self-assessing himself a specific tax liability which was not paid with the returns. California Revenue and Taxation Code § 18551 requires, for a calendar year taxpayer, the personal income tax to be paid by April 15 following the close of the calendar year for which the tax is owed. If not paid by the April 15 date, the liability immediately becomes due and payable on the day after such payment due date and collection procedures may immediately commence. (Revenue and Taxation Code § 18881(a).[3]

The Board has several alternative methods by which it may effect collection. The methods are *cumulative* and may be used in combination with or separate from each other. (Rev. & Tax. Code § 18931.) As in the instant case, an order to withhold may be issued. (Rev. & Tax. Code §§ 18817-18819.) A civil suit for tax may be brought. (Rev. & Tax. Code § 18831.) A certificate constituting a judgment may be filed (Rev. & Tax. Code §§ 18861-18863) and the Board may execute upon said judgment. (Rev. & Tax. Code § 18865.) In addition, when the tax is not paid timely, a perfected and enforceable state tax lien upon all of the taxpayer's property within California in the amount of the self-assessment arises upon which the Board may levy for purposes of collection. (Rev. & Tax. Code § 18881.) Finally, a warrant may be issued for the collection of the tax liability (Rev. & Tax. Code § 18906), which has the same force and effect as a writ of execution, and is to be levied in the same manner and with the same force and effect as a levy of a writ of execution. (Rev. & Tax. Code § 18907.)

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[3]See *Randall v. Franchise Tax Board* (9th Cir. 1971) 453 F.2d 381, where the Ninth Circuit upheld the Board's summary collection procedures with respect to a similar self-assessed liability.

Furthermore, the Board shall be entitled to all of the remedies of a judgment creditor. (California Code of Civil Procedure § 688.020(a).

An Order To Withhold (Rev. & Tax. Code § 18817) has the same force and effect as a warrant for collection, except that there are no exemptions from the Order-to-Withhold process. *Greene v. Franchise Tax Bd.* (1972) 27 Cal.App.3d 38, 41-45. The Order-to-Withhold procedure is like post-judgment execution. *Randall v. Franchise Tax Board, supra*, 453 F.2d 381, 382. As stated, the summary tax collection procedures employed by the Board have been held to be constitutional by the Ninth Circuit. *Ibid. Bomher v. Reagan, supra*, 522 F.2d 1201, 1202; *Kelly v. Springett, supra*, 527 F.2d 1090, 1094; *Aronoff v. Franchise Tax Board, supra*, 348 F.2d 9, 10-11. The argument that a tax debt must be supported by a court judgment before payment of the debt may be required was expressly rejected in *Bomher v. Reagan, supra*, 522 F.2d at 1201-1202.

Any employer failing to withhold the amount due from any taxpayer and failing to transmit the same to the Board after service of an Order-to-Withhold is liable to the Board for such amount. (Rev. & Tax Code § 18818.) The Postal Service which admittedly was the employer of three of the four tax debtors in question was required by Revenue and Taxation Code § 18818 to withhold and transmit the amounts owed to the tax debtors to the Board. *People v. Freeny* (1974) 37 Cal.App.3d 20, 31. Any employer required to withhold and transmit any amount is to do so without resort to any court action. (Rev. & Tax. Code § 18819.) Accordingly, the law *compelled* the Postal Service to deliver the funds in question to the Board. *Kanarek v. Davidson* (1978) 85 Cal.App.3d 341, 346. As the Postal Service failed to comply with the law, it is liable to the Board for the amounts it should have withheld and transmitted thereto.

V.

UNDER THE BUCK ACT THE BOARD HAS THE POWER TO LEVY AND COLLECT PERSONAL INCOME TAX FROM POSTAL SERVICE EMPLOYEES.

In 1939, this Court held that the salaries of employees or officials of the federal government or its instrumentalities were not immune from taxation by the states. *Graves v. N.Y. ex rel.*

O'Keefe (1939) 306 U.S. 466, 480-7; *State Tax Comm'n v. Van Cott* (1939) 306 U.S. 511, 515.

In the same year as the *Graves* decision, Congress passed the Public Salary Act of 1939 (4 U.S.C. § 111, formerly 5 U.S.C. § 84a), expressly consenting to state taxation of pay or compensation for personal service of federal employees.

In 1940, Congress enacted the Buck Act (4 U.S.C. §§ 105-110) which gave consent to the levy and collection of various taxes from federal employees in federal areas. Section 106 of the Buck Act authorizes the levy and collection of state income taxes from federal employees.

It is important to note that 4 U.S.C. § 106(a) speaks in terms of the State having full jurisdiction and power to levy and collect income taxes within a "federal area" just as if it were not a federal area, *Howard v. Commissioners* (1953) 344 U.S. 624, 628-9.

The term "federal area" is defined in section 110(e) of the Buck Act and has been recently held by the Supreme Court of Colorado to include the branch offices of the Postal Service as well as the main post offices. *Rountree v. City and County of Denver* (Colorado, 1979) 596 P.2d 739, 740-1. As a result, the City and County of Denver was permitted to levy *and collect* from eight Postal Service employees an occupation tax regardless of the working location of the employees. *Id.*

Unquestionably, in order to give the Buck Act any meaning, the taxing authority must have the power to *enforce* the levying and collection of its tax both within and without federal areas. Such a result has been reached in *City of Philadelphia v. Konopacki* (Pen., 1976) 366 A.2d 608, 610.

Furthermore, it is the long established policy of the Federal Government that its employees have an ethical responsibility to pay their state taxes. *Non-Resident Taxpayers Ass'n. v. Municipality of Phila.* (3rd Cir. 1973) 478 F.2d 456, 459.

CONCLUSION.

For the above stated reasons, the Franchise Tax Board respectfully submits that this Court should note probable jurisdiction to:

1. Clarify the status of the Postal Service under the Postal Reorganization Act and find that it has been launched into the commercial world and accordingly should be required to honor the Order to Withhold of the Franchise Tax Board.

2. Settle the diversity of opinion presently existing between seven separate Circuit Courts of Appeal and the Ninth Circuit with regard to the garnishment of Postal Service employees' wages.

Respectfully submitted,

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APPENDIX A.

Opinion.

In the United States Court of Appeals for the Ninth Circuit.

Employment Development Department, Plaintiff-Appellant, vs. United States Postal Service, Defendant-Appellee. No. 80-5694. D.C. # CV-78-4014-HP.

Franchise Tax Board, Plaintiff-Appellant, vs. United States Postal Service, Defendant-Appellee. No. 80-5700. D.C. # CV-78-4746-HP.

Filed: February 10, 1983.

Appeal from the United States District Court for the Central District of California.

Harry Pregerson, District Judge, Presiding. Argued and submitted December 8, 1981.

Before: SCHROEDER AND REINHARDT, Circuit Judges, and THOMPSON,* District Judge.

PER CURIAM:

At issue is whether California state agencies may use California summary tax collection procedures to reach funds in the hands of the United States Postal Service. The district court consolidated these two cases involving similar facts and legal questions but different statutes, and granted summary judgment for the Postal Service. In both cases, California state taxing authorities sought to utilize administrative collection procedures resembling garnishment in order to collect sums owed by the Postal Service to delinquent taxpayers.

Plaintiff in the first case is the Employment Development Department, seeking to recover unemployment insurance taxes owed to the state by contractors who have done work for the Postal Service. Plaintiff in the second case is the Franchise Tax Board, seeking to collect personal income

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*Honorable Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by designation.

taxes owed by Postal Service employees. Because the applicable statutes and resulting analysis differ, we discuss each case separately.

1. *The Employment Development Department*

In February 1978, the Employment Development Department (the Department) issued two "notices of levy" pursuant to § 1755[1] of the California Unemployment Insurance Code, notifying the Postal Service that two of its mail transportation contractors were delinquent in paying taxes to the Department. The notices purported to constitute a levy on monies owed to those tax debtors by the Postal Service. The Postal Service refused to comply, stating that it was not authorized to make the payment requested. In October 1978, the Department filed this action seeking judgment in the amount of the tax delinquencies, and court costs.

The district court granted summary judgment for the Postal Service, holding Cal. Unemp. Ins. Code § 1755 inapplicable to the Postal Service because that statute does not expressly include within its reach the United States and its agencies or instrumentalities. In the alternative, the district

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[1]Cal. Unemp. Ins. Code § 1755 provides:

> If any person or employing unit is delinquent in the payment of any contributions, penalties or interest provided for in this division, the director may . . . collect the delinquency or enforce any liens by levy served either personally or by certified mail, to all persons having in their possession or under their control any credits . . . belonging to the delinquent person or employing unit, or owing any debts to such person or employing unit at the time of the receipt of the notice of levy. Any person upon whom a levy has been served having in his possession or under his control any credits . . . belonging to the delinquent person or employing unit or owing any debts to such person or employing unit at the time of the receipt of the levy, shall surrender such credits . . . to the director or pay to the director the amount of any debt owing the delinquent employer within five days of service of the levy. Any such person in possession of any credits . . . or owing any debts to the delinquent person or employing unit who surrenders such credits . . . or pays such debts owing the delinquent person or employing unit shall be discharged from any obligation or liability to the delinquent person or employing unit with respect to the credits . . . surrendered or debts paid to the director. . . .

court found the Department's claim barred by 39 U.S.C. § 5006, on the theory that that section is the exclusive statutory authority for reaching funds in the hands of the Postal Service owed to its contractors, and that the Department is not one of those authorized to proceed under that section.

We consider first whether Cal. Unemp. Ins. Code § 1755 authorizes the Department to proceed by administrative levy against the Postal Service. If it does, we must also consider whether such levies are nevertheless prohibited by applicable federal law.

The Postal service contends that state law does not authorize use of the levy procedures against an agency of the United States because such agencies are not expressly made subject to levy by the statute. The Postal Service does not contend that it is immune from all suits, for § 401(1) of the Postal Reorganization Act[2] clearly and unambiguously waives sovereign immunity by providing that the Service "may sue and be sued." *See generally FHA v. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490 (1940). Rather, the Service argues that the state statute is by its own terms inapplicable.

The statute provides that the Director may serve the notices of levy on "all persons" having under their control any assets of the tax debtor. Section 1757 states that "any person" failing to turn over such credits shall be liable to the Department in the amount owed to the tax debtor, but not exceeding the amount specified in the notice of levy.

While these two sections appear to be quite broad in scope, the current problem arises from the fact that section 1758 states only that "[a]s used in this article 'person' includes this State and any county, city and county, municipality, district or other political subdivision thereof." The Service argues that, in referring to state and local gov-

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[2]Act of Aug. 12, 1970, Pub. L. No. 91-375, 84 Stat. 719, *codified* at 39 U.S.C. §§ 101 *et seq.*

ernmental entities but omitting any reference to their federal counterparts, the state legislature exempted federal agencies from the statute.[3]

A specific reference to state governmental entities is necessary if the legislature intends to waive the immunity to which those entities would otherwise be entitled under state law. Cal. Const. art. 20, § 6; *Rose v. State*, 19 Cal.2d 713, 123 P.2d 505, 512 (1942); *Galbes v. Girard*, 46 F. 500, 501 (C.C.S.D. Cal. 1891). *Cf. Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149-50 (1981) (per curiam) (waiver of state's eleventh amendment immunity found only by express language or such overwhelming implication from text that no other construction reasonable); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (same). But reference to federal entities in a state statute would serve no similar purpose since an act of Congress, not of a state legislature, is necessary to effect a waiver of federal immunity. *Army & Air Force Exchange Service v. Sheehan*, ___ U.S. ___, 102 S.Ct. 2118 (1982); *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. King*, 395 U.S. 1, 4 (1969).

The Service argues that the term "person" when used in a state statute can never, as a matter of statutory interpretation, include federal entities, but it offers no persuasive authority for such a rule. It relies upon *United States v. United Mine Workers*, 330 U.S. 258, 272, 67 S.Ct. 677, 686 (1947), which stated that "statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." The court there held that Congress did not intend to treat the United States in the same manner as other "em-

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[3]The definition of "person" in § 1758 does not expressly refer to those types of entities commonly subject to the withholding requirements of state unemployment insurance taxes, *i.e.*, corporations, partnerships and associations, but the Postal Service does not suggest that those entities are exempt by virtue of the omission.

ployers" under federal labor laws. *Id.* at 276, 67 S.Ct. at 687. *United Mine Workers* establishes no general rule of construction applicable here. Interpretation of the California statute involves construction of state law, not the scope of federal sovereign immunity.[4] The Postal Service offers neither a reason why California should wish to treat federal agencies any differently than it treats other employers for purposes of state tax collection procedures, nor any indication that the state legislature intended to do so.

Our conclusion that state law authorizes the Department to direct notices of levy under § 1755 to the Postal Service is reinforced by a rule of construction used by the California courts. In construing Cal. Civ. Proc. Code § 17, which parallels section 1758 in stating that the term " 'person' includes" listed types of entities, the California court of appeal articulated the California rule:

> The statement that the word person "includes" a natural person and a corporation leaves open for consideration what other types of entities that word includes when used in a particular context to meet a given situation. The word "includes" is not ordinarily a word of limitation but rather of enlargement.

Oil Workers International Union v. Superior Court, 103 Cal. App. 2d 512, 230 P.2d 71, 105-06 (1951). *Accord, People v. Western Air Lines, Inc.*, 42 Cal.2d 621, 268 P.2d 723, 733 (1954); *Patricia J. v. Rio Linda Union School District*, 61 Cal.App.3d 278, 132 Cal.Rptr. 211, 216 (1976); *Datil v. City of Los Angeles*, 263 Cal.App.2d 655, 69 Cal.Rptr. 788, 790 (1968); *Durkin v. Durkin*, 133

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[4]Nor is it clear that Cal. Unemp. Ins. Code § 1755 operates to "divest pre-existing rights" within the meaning of *United Mine Workers*. Traditionally, labor injunctions had been available to employers under certain circumstances; the Norris-LaGuardia Act, however, divested federal courts of jurisdiction to issue such injunctions. 29 U.S.C. § 101. The relevant sections of the California Unemployment Insurance Code do not appear to "divest" the Postal Service of any "rights or privileges" in the sense the Supreme Court used those terms, since they do not take away remedies previously available.

Cal.App.2d 283, 284 P.2d 185, 188-89 (1955). We therefore conclude that the Postal Service is a "person" against whom the Department may proceed under § 1755.[5]

The Service's alternative contention is that even if the California statute is construed to apply to the Postal Service, the statute is inconsistent with and therefore preempted by 39 U.S.C. § 5006.[6] That statute by its terms governs the creation of liens in favor of those who perform services for a Postal Service contractor or subcontractor. The parties agree that the Department cannot become a lienor within the meaning of the statute, since it has not performed services for a Postal Service contractor or subcontractor. The Service goes on to argue, however, that because § 5006 is the only statutory authority exressly conferring a right to proceed against the Service in order to reach funds owed to a postal contractor or subcontractor, the Department may not levy upon such funds in any other fashion.

The Service cites no cases in support of its position, and several courts have effectively established that § 5006 is not the exclusive means of attaching Postal Service funds

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[5]*Cf. Georgia v. Evans*, 316 U.S. 159, 162 (1942) ("any person," as used in § 7 of Sherman Act, 15 U.S.C. § 15, includes states); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906) ("any person," as used in § 8 of Sherman Act, 15 U.S.C. § &, includes municipalities). *Accord, City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 395-97 & nn.10, 14 (1978).

[6]That section provides only that:

(a) A person who—

(1) performs service for a contractor or or subcontractor in the transportation of mail;

(2) files his contract for service with the Postal Service; and

(3) files satisfactory evidence of performance with the Postal Service;

shall have a lien on money due the contractor or subcontractor for the service

(b) The Postal Service may pay the person establishing a lien under subsection (a) of this section the sum due him, when the contractor or subcontractor fails to pay the person the amount of his lien within 2 months after the expiration of the month in which the service was performed. It shall charge the amount so paid to the contract. The payments may not exceed the annual rate of pay of the contractor or subcontractor.

owed to contractors or subcontractors. In *Kennedy Electric Co. v. United States Postal Service*, 508 F.2d 954 (10th Cir. 1974), a subcontractor was allowed to recover from the Postal Service money owed to the general contractor by the Service. The court did not mention § 5006; recovery was permitted because the subcontractor had established an equitable lien, not a statutory one. Moreover, the Service's argument is inconsistent with other decisions allowing garnishment of Postal Service funds without regard to whether the debt garnished is owed to a contractor or subcontractor. *General Electric Credit Corp. v. Smith*, 565 F.2d 291 (4th Cir. 1977) (per curiam); *May Department Stores Co. v. Williamson*, 549 F.2d 1147 (8th Cir. 1977); *Standard Oil Division, American Oil Co. v. Starks*, 528 F.2d 201 (7th Cir. 1975) (per curiam).

Accordingly, we hold that 39 U.S.C. § 5006 does not bar the collection procedures utilized here. The summary judgment granted against the Employment Development Department and in favor of the United States Postal Service is reversed.

II. *The Franchise Tax Board*

In Mid-1978, the Franchise Tax Board (the Board) issued four "orders to withhold" to the Postal Service under Cal. Rev. & Tax. Code § 18817.[7] These orders informed the Postal Service that four individual employees were delin-

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[7]Cal. Rev. & Tax. Code § 18817 provides:

> The Franchise Tax Board may by notice, served personally or by first class mail, require any employer, person, officer or department of the state, . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer or to an employer or person who has failed to withhold and transmit amounts due pursuant to Section 18815 or 18818, to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer or the amount of any liability incurred by such employer or person for failure to withhold and transmit amounts due from a taxpayer under this part and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate.

quent in paying state income taxes. The orders purported to constitute a levy on the credits or payments owed by the Postal Service to the four Taxpayer-employees. The Postal Service refused to comply, arguing as it had with the Department that the statute authorizing such orders was not applicable to federal agencies such as the Postal Service. The Board commenced this action in December 1978, seeking judgment in the amount of the tax delinquencies and court costs.

The district court held in granting summary judgment for the Postal Service that, first, state law does not authorize such levies against federal agencies, and second, the Postal Service cannot be required to collect delinquent California tax liabilities of its employees because a contrary conclusion would violate 5 U.S.C. § 5517, which governs the withholding of state income taxes by federal agencies.

The Postal Service's first argument, that the California Revenue and Taxation Code does not authorize use of the summary tax collection procedures against a federal agency, is frivolous in view of the express provisions of those statutes. Here, unlike the situation in the companion case involving the Employment Development Department, the California legislature has unequivocally demonstrated its intention. It is true that neither the Postal Service in particular, nor federal agencies in general, are expressly included within the definition of "employer" embodied in section 18810.[8] That definition, however, must be read together

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[8]Cal. Rev. & Tax. Code § 18810(a) has been repealed and recodified at Cal. Unemp. Ins. Code § 13005. At the time relevant to this lawsuit, § 18810(a) provided:

> For purposes of this chapter, the term "employer" means any individual, person, corporation, association or partnership, or any agent thereof, doing business in this state, deriving income from sources within the state, or in any manner whatsoever subject to the laws of this state, the State of California or any political subdivision or agency thereof, including the Regents of the University of California, any city organized under a freeholders' charter, or any political body not a subdivision or agency of the state, and any person, officer, employee, department, or agency

with the definition of "employee" in section 18809, repealed in 1980 and recodified at Cal. Unemp. Ins. Code § 13004. An employee is "[any] individual who receives remuneration for services performed within this state and includes an officer, employee, or elected official of the United States . . . or any agency or instrumentality [thereof]." Thus, reading the two sections together, it is obvious that the Postal Service is an "employer" indebted to an "employee" within the meaning of those sections.[9] State law clearly authorizes issuance of notices to withhold to the Postal Service.

It remains to be considered only whether the Service is nevertheless excused from compliance by federal law. Under 5 U.S.C. § 5517,[10] the Secretary of the Treasury is

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thereof, making payment of wages to employees for services performed within this state. . . .

It is not contended that in order to be operative the statute must refer specifically to the Postal Service; the Service does argue that applicability to federal agencies in general will not be implied, in the absence of express language.

[9]This conclusion is made express in a formal regulation promulgated by the Board. Cal. Admin. Code, tit. 18 regulation 18810. Subsection (a) of that regulation states that: "[t]he term 'employer' means any person for whom an individual performs or performed any service, of whatever nature, as the employee of such person." Subsection (d) further states that "[t]he term 'employer' embraces not only individuals and organizations engaged in trade or business, but . . . the governments of the United States, the states, territories, and the District of Columbia, including their agencies, instrumentalities, and political subdivisions."

[10]5 U.S.D. § 5517 provides:

(a) When a State statute—

(1) provides for the collection of a tax either by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State, or by granting to employers generally the authority to withhold sums from the pay of employees if any employee voluntarily elects to have such sums withheld; and

(2) imposes the duty or grants the authority to withhold generally with respect to the pay of employees who are residents of the State;

the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the State

required to enter into contracts with states wishing federal agencies and instrumentalities to withhold state income taxes from payments to employees liable therefor. Subsection (b) and the parallel provision of the contract between the Secretary and California prohibit the imposition of "a penalty or liability because of this section" on "the United States or its employees."[11]

The Service argues that the provisions of § 5517 prohibit these levies. We agree. This section, the substance of which has been in effect since 1952, was enacted for the specific purpose of providing for the withholding of state income taxes from the earnings of federal employees. On November 6, 1952, the state of California entered into an agreement as contemplated by § 5517. The agreement specifically states: "3. Nothing in this agreement shall be deemed: . . . (b) to require collection by agencies of the United States of delinquent tax liabilities of federal employees." The standard agreement prescribed by regulation, 31 C.F.R. 215.12(a) (1978) contains the same provision. The regulations promulgated by the Secretary of the Treasury to implement § 5517 are specifically applicable to the United States Postal Service. 31 C.F.R. § 215.2(a). Before the enactment of the Postal Reorganization Act (Footnote 2), the Post Office Department employees in California were subjected to withholding of state income taxes in accordance with § 5517 and the agreement.

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withholding statute in the case of employees of the agency who are subject to the tax and whose regular place of Federal employment is within the State with which the agreement is made. . . . (b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section. An agency of the United States may not accept pay from a State for services performed in withholding State income taxes from the pay of the employees of the agency.

[11] *See* n. 10, *supra*. *See generally* 31 C.F.R. §§ 215.1 — 215.13.

The Congress included 39 U.S.C. § 410 in the Postal Reorganization Act. It provides, in part: "Except as provided in subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts . . . employees . . . or funds . . . apply to the exercise of the powers of the Postal Service." Subsection (b) does not include § 5517 (withholding of state income taxes) but does include § 5520 (withholding of city income and employment taxes). Section 5520 was first enacted on July 10, 1974, 88 Stat. 294, and 39 U.S.C. § 410 was amended by the same law to include this new provision for withholding city income and employment taxes as a law applicable to the Postal Service.

When the Postal Reorganization Act was adopted, the Congress was faced with the situation of transforming an established federal agency, the Post Office Department, into the United States Postal Service, "an independent establishment of the executive branch." The transition was accomplished with as little disruption as possible. In substance, all previous laws, regulations and contracts remained in effect until changed by the Board of Governors of the new independent establishment. 62 Am.Jur.2d, § 2, p.6.[12] It is true that the language of 39 U.S.C. § 410, "insofar as such laws remain in force as rules or regulations of the

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[12]62 Am.Jur., § 2, p. 6.

In enacting the Postal Reorganization Act, Congress provided that all orders, determinations, rules, regulations, permits contracts, certificates, licenses, and privileges which remained effective at the time the Postal Service commenced operating were to continue in effect until modified, terminated, superseded, set aside, or repealed by the Service in the exercise of its administrative authority. Moreover, Congress provided that all provisions of Title 39 of the United States Code in effect immediately prior to the effective date of such act are to continue in force as rules or regulations of the Postal Service, to the extent that the Service is authorized to adopt such provisions as rules or regulations until they are revoked, amended, or revised by the Postal Service.

Postal Service," may be somewhat equivocal in support of this conclusion, but the Savings Provision of Public Law 91-375 (84 Stat. at 774-5) is much more specific.[13]

The undisputed evidence shows that the United States Postal Service did recognize that the withholding of state income taxes contract does apply to it and continues in force and effect. When in 1974 a new act was passed authorizing similar agreements for the withholding of city or county income or employment taxes, the fact that this law was made specifically applicable to the United States Postal Service implies Congressional recognition that the statute pertaining to the withholding of state income taxes was already applicable to it. The anomoly inherent in any other conclusion is obvious.

The orders to withhold served by the Franchise Tax Board were issued pursuant to Cal. Rev. & T. Code § 18817 (Footnote 7), which is part of Chapter 19, Article I of the

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[13]Savings Provision of Public Law 91-375 (84 St. at 774-5).

Sec. 5.(a) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges —

(1) which have been issued, made, granted, or allowed to become effective

(A) under any provision of law amended by this Act; or

(B) in the exercise of duties, powers, or functions which are transferred under this Act;

by (i) any department or agency, any functions of which are transferred by this Act, or (ii) any court of competent jurisdiction; and

(2) which are in effect at the time the United States Postal Service commences operations, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Postal Service (in the exercise of any authority vested in it by this Act), by any court of competent jurisdiction, or by operation of law.

* * *

(f) Provisions of title 39, United States Code, in effect immediately prior to the effective date of this section, but not reenacted by this Act, shall remain in force as rules or regulations of the Postal Service established by this Act, to the extent the Postal Service is authorized to adopt such provisions as rules or regulations, until they are revoked, amended, or revised by the Postal Service.

Revenue and Taxation Code relating to "Information and Withholding Tax at Source." It deals with the same subject matter as 5 U.S.C. § 5517. In view of the agreements and regulations pursuant to the authorization of § 5517, federal cooperation with state withholding tax statutes is limited to current withholding from current wages to meet current anticipated income tax liabilities of the federal employee. Withholding of wages of federal employees cannot be used to collect delinquent tax liabilities.

The Franchise Tax Board argues with considerable persuasiveness that the United States Postal Service is now a quasi-autonomous entity. The Postal Service has been "launched into the commercial world." *See FHA v. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490 (1940); *May Department Stores Co. v. Williamson*, 549 F.2d 1147, 1148 (8th Cir. 1977); *Standard Oil Division, American Oil Co. v. Starks*, 528 F.2d 201, 202-3 (7th Cir. 1975). The Postal Reorganization Act, 39 U.S.C. § 401(1), with two narrow limitations not relevant here, expressly confers on the Postal Service the general power to sue and be sued in its official name. So, it is contended that this general waiver of immunity overrides the specific limitations and restrictions of 5 U.S.C. § 5517 and the pertinent agreements and regulations. We do not agree. The general rule of statutory construction is that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 552, 94 S.Ct. 2474, 2483 (1974). *See also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151, 96 S.Ct. 1989, 1992-3 (1976).[14]

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[14] *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151.

It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417

(footnote continued on following page)

The summary judgment granted against the Franchise Tax Board and in favor of the United States Postal Service is affirmed.

U.S. 535, 550-551, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290, 301. "The reason and philosphy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all." T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874).

Employment Development Department v. United States Postal Service, No. 80-5694 and *Franchise Tax Board v. United States Postal Service*, No. 80-5700.

SCHROEDER, Circuit Judge, Dissenting in part:

I concur in the court's opinion in No. 80-5694 holding that the California Employment Development Department may recover funds which the U.S. Postal Service owes to mail transportation contractors who are delinquent in paying state unemployment taxes.

I dissent from the decision in No. 80-5700 which holds that the California Franchise Tax Board may not use similar procedures to recover funds which the Service owes to employees who are delinquent in paying state income taxes. The majority reaches that determination because it interprets 5 U.S.C. § 5517 to prohibit use of such procedures. I cannot agree.

Section 5517 authorizes federal agencies to withhold state income taxes from their employees' salaries. By its own terms, it is a limited waiver of sovereign immunity. It therefore provides in part that

> (b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section. 5 U.S.C. § 5517(b) (1976).

The language is merely a description of the limited congressional consent given in that provision. It does not purport to limit congressional power to waive immunity in other statutes.

In the Postal Reorganization Act, Congress did waive Postal Service immunity, without any qualification regarding state tax procedures, by providing that the Service can "sue or be sued" like a private employer. 39 U.S.C. § 401(1) (1976). *See FHA v. Burr*, 309 U.S. 242, 245, 60 S. Ct. 488, 490 (1940). The federal courts have consistently held

that section 401(1) waives Postal Service immunity from state garnishment proceedings. *Associates Financial Services v. Robinson*, 582 F.2d 1 (5th Cir. 1978) (per curiam); *Beneficial Finance Co. v. Dallas*, 571 F.2d 125 (2d Cir. 1978); *General Electric Credit Corp. v. Smith*, 565 F.2d 291 (4th Cir. 1977) (per curiam); *Goodman's Furniture Co. v. United States Postal Service*, 561 F.2d 462 (3d Cir. 1977) (per curiam); *May Department Stores Co. v. Williamson*, 549 F.2d 1147 (8th Cir. 1977); *Standard Oil Division, American Oil Co. v. Starks*, 528 F.2d 201 (7th Cir. 1975) (per curiam). *See also Sportique Fashions, Inc. v. Sullivan*, 597 F.2d 664, 665 n.2 (9th Cir. 1979) (dictum). *Cf. Snapp v. United States Postal Service*, 664 F.2d 1329 (5th Cir. 1982) (rejecting attempt by Postal Service employee to enjoin wage garnishment); *Long Island Trust Co. v. United States Postal Service*, 647 F.2d 336 (2d Cir. 1981) (assuming without discussion amenability of Postal Service to garnishment).

The statutory collection process in question here is essentially a garnishment procedure. We are offered no reason why Congress would wish to treat Postal Service employees' tax debts any differently than it treats their other debts. Nor are we offered any statutory language requiring such a distinction.

I conclude that California's income tax collection procedures do not offend the provisions of 5 U.S.C. § 5517, and that their implementation in this case is the only result which furthers Congress' intent to treat the Service like a private employer. I would therefore reverse both judgments.

APPENDIX B.

Judgment.

United States District Court, Central District of California.

Employment Development Department, Plaintiff, v. United States Postal Service, Defendant. No. CV 78-4014-HP (Px).

Franchise Tax Board, Plaintiff, v. United States Postal Service, Defendant. No. CV 78-4746-HP (Px).

Filed: July 7, 1980.

This case having come on for hearing on defendant's Motion For Judgment On The Pleadings, Or, In The Alternative, For Summary Judgment on May 21, 1980, before the Honorable Harry Pregerson, the plaintiff being represented by its counsel George Deukmejian, Attorney General, California, and the defendant having been represented by its counsel, Alice Daniel, Assistant Attorney General, Civil Division, Department of Justice, and the Court having considered all the pleadings, memoranda, and having heard the oral argument presented at time of hearing, and consistent with the Findings of Fact and Conclusions of Law on file herein:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be and hereby is entered in favor of the defendant and against the plaintiffs dismissing these consolidated actions.

DATED: This 7th day of July, 1980.

/s/ Harry Pregerson
UNITED STATES CIRCUIT JUDGE
Sitting by designation

PRESENTED BY:

ALICE DANIEL
Assistant Attorney General

/s/ David Epstein
DAVID EPSTEIN

/s/ Gwynn T. Swinson
GWYNN T. SWINSON

/s/ Alfreda Robinson-Bennett
ALFREDA ROBINSON-BENNETT
Civil Division
Department of Justice

APPENDIX C.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Employment Development Department, Plaintiff, vs. United States Postal Service, Defendant.

Franchise Tax Board, Plaintiff, vs. United States Postal Service, Defendant.

Nos. CV 78-4014-HP, CV 78-4746-HP.

Filed: August 6, 1980.

Defendant's Motion for Summary Judgment came on for hearing before this court, plaintiff appearing through its counsel, George Deukmejian and Jeffrey M. Vesely, and defendant having appeared through its counsel, Alice Daniel, Assistant Attorney General, David Epstein, Gwynn T. Swinson, and Alfreda Robinson-Bennett, Attorneys, Civil Division, Department of Justice. The court having considered the pleadings, memoranda, exhibits, and all other documents herein, and having heard oral argument, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

In February 1978, the Employment Development Department (the Department) issued two Notices of Levy, pursuant to section 1755 of the California Unemployment Insurance Code, notifying defendant that two tax debtors, who allegedly held mail transportation contracts with defendant, were delinquent in paying taxes to the Department. (See Employment Development's Complaint, ¶¶5, 6, 12, 13). The notices purported to constitute a levy on the salary or accounts receivable paid or owed to these tax debtor mail contractors. (See Employment Development's Complaint, Exhibits A and C). By letters dated March 9 and 10, 1978, defendant declined to comply with the two notices on the

ground that it was not authorized to make the payments requested therein. (Employment Development's Complaint, Exhibits B and D).

II.

On October 18, 1978, the Department commenced this action against defendant seeking to recover damages for defendant's failure to deliver the personal property levied upon. The Department seeks court costs and a judgment against defendant up to the sum of $896.20 for the amount of delinquent taxes owed by one mail transportation contractor. (See Employment Development's Complaint, p. 4). With respect to the second contractor, the Department seeks a judgment against defendant up to the sum of $2,048.38. (See Employment Development's Complaint, p. 4).

III.

During July and August 1978, the Franchise Tax Board (the Board) issued four Orders to Withhold to defendant under section 18817 of the California Revenue and Taxation Code. (See the Board's Complaint, ¶¶8, 17, 26, 35). These orders stated that four individual residents of Los Angeles County, believed to be employed by defendant, were delinquent in paying state income taxes for certain specified years. (See the Board's Complaint, Exhibits C, F, J. M). The orders purported to constitute a levy on the credits or payments paid or owed by defendant to the four taxpayer-employees. (Exhibits C, F, J. M.) By letters dated August 1, 23, and 29, 1978, defendants returned the orders stating that such orders are not applicable to federal agencies such as the Postal Service. (See the Board's Complaint, Exhibits D, G, K, N.)

IV.

The Board commenced this action against defendant on December 13, 1978, seeking to recover damages for failure to deliver personal property levied upon. The Board seeks court costs and judgments in the sums of $1,577.16, $952.21,

$5,086.60 and $729.45 for the amount of delinquent taxes owed by each employee, respectively. (See the Board's Complaint, p. 8).

V.

Pursuant to the authority granted by numerous provisions of the Postal Reorganization Act, 39 U.S.C. §101, *et seq.*, the Postal Service complies voluntarily with an agreement executed by the Secretary of the Treasury and the State of California on February 25, 1974; as amended by 39 C.F.R. §215 (1979), pursuant to 5 U.S.C. §5517. Section 5517 generally provides for federal agencies to withhold state income taxes from federal employees' paychecks in accordance with the withholding provisions of state income tax laws. (See Affidavit of James L. Healy, General Manager of the Payroll Requirements Division of the Finance Department of the United States Postal Service, hereafter referred to as the "Healy Affidavit," ¶2).

VI.

The Postal Service's withholding program is coextensive with the Secretary's February 25, 1974 agreement with the State as amended. (Healy Affidavit, ¶3). The Postal Service does not collect delinquent California tax liabilities of its employees since the agreement provides, *inter alia*, that nothing therein shall require collection by federal agencies of delinquent tax liabilities of federal employees. (Healy Affidavit, ¶3). The Postal Service's Financial Management Manual, which contains regulations prescribing permissible deductions from employees' pay, does not authorize deductions from employee pay pursuant to state administrative tax levies. (Healy Affidavit, ¶4).

CONCLUSIONS OF LAW

I.

Section 18818 is in direct conflict with the federal statute governing the withholding of state income taxes: section 18818 imposes liability on the employer for failing to collect

any tax payments due from the employee, while 5 U.S.C. §5517(b) precludes the imposition of liability or a penalty on the United States or its employees regarding the withholding of state income taxes. Under the Supremacy Clause of the U.S. Constitution (Article VI, Clause 2), the California statute must yield to 5 U.S.C. §5517(b) since the state statute, as applied, is irreconcilably in conflict with federal law. *Paul v. United States*, 371 U.S. 245 (1963). In addition to the conflict between these statutes, the Postal Service is immune from state taxation or regulation, including the application of a statute which imposes liability for payment of the tax debts of postal employees. *Mayo v. United States*, 319 U.S. 441 (1943); *McCulloch v. Maryland*, 17 U.S. 316 (1819). Under an analogous principle derived from the Supremacy Clause, the Federal Government, and its agencies and instrumentalities, are immune from state control or regulation, unless Congress specifically provides otherwise. *Mayo v. United States, supra*. Application of the California statute would burden the Postal federal function by subjecting the Postal Service to a state law which contains more burdensome requirements than the employee tax withholding that federal law has authorized. Therefore, the Supremacy Clause prohibits application of the California statute in this case.

II.

The provisions of the contract executed between the Secretary of Treasury and the State of California pursuant to 5 U.S.C. §5517 are controlling in this action and preclude the imposition of liability on the defendant. The rights of parties to federal contracts, such as the section 5517 contract, are determined by the federal contract (as federal law) rather than by state law. The rationale for this rule is based on the Supremacy Clause and the necessity for uniform construction and application of such contracts throughout the United States. *United States v. Allegheny*, 322 U.S.

174, 183 (1943); *Clearfield Trust v. United States*, 318 U.S. 363, 366 (1942); *United States v. View Crest Gardens*, 268 F.2d 380 (9th Cir. 1959).

III.

The section 5517 contract authorizes withholding only and does not require any collection of delinquent tax liabilities by federal officials in any manner whatsoever. Moreover, the section 5517 contract expressly precludes liability on the part of federal officials. The State levy procedure would require the Postal Service, in contravention of the contract, to collect delinquent tax liabilities by remitting sums to plaintiff for the purpose of collecting State tax delinquencies. Moreover, the procedures imposed by State law would, contrary to the agreement, subject the Postal Service to liability for failing to remit sums levied upon.

IV.

The Employment Development Department's claim to funds allegedly owed by the Postal Service to mail transportation contractors is barred under 39 U.S.C. §5006. In the absence of any statutory authorization or contractual agreement permitting garnishment of funds owed to transportation contractors, the State is precluded from seeking to attach such funds. The provisions of 39 U.S.C. §5009 do not give states or agencies of states like Employment Development a private cause of action against the Postal Service. Moreover, the provisions of 39 U.S.C. §5006 which set forth the exclusive remedy for attachment of funds belonging to mail transportation contractors is inapplicable to plaintiff.

V.

The language of section 5006 demonstrates that the right of attachment under this provision extends only to persons who perform services for a contractor or subcontractor in

the transportation of mail. Accordingly, the Employment Development Department is not within the class of persons included in section 5006.

VI.

Both the Employment Development and Francise Tax Board complaints fail to state a claim upon which relief can be granted since the complaints allege a breach of duty and liability under state statutes which are inapplicable to the Postal service.

VII.

Section 1758 of the California Unemployment Insurance Code defines the term "person" as used in sections 1755 and 1757 as the State of California, any county, city, municipality, district or other political subdivision thereof. The United States and its agencies are expressly excluded from this definition. Moreover, there can be no inference that the United States or its agencies are included. Thus, California's provisions for service of Notices of Levy and the imposition of liability for failing to comply with such notices are inapplicable to the Postal Service as an agency of the United States. See, *National Railroad Passenger Corp. v. National Assoc. of Railroad Passengers*, 414 U.S. 453 (1974).

VIII.

Sections 18817 and 18818 apply to "employers" and "persons." However, the code does not specifically define those terms to include the United States and its agencies. See section 18810. Therefore, under general principles of statutory construction, the United States and its agencies are excluded from those terms.

IX.

This court finds that the terms "employer" and "person" as defined in section 1758 of the Unemployment Insurance Code and section 18810 of the Revenue and Taxation Code do not refer to the Postal Service. The court further finds

that if these provisions, which mandate a duty to withhold and liability, had been intended to apply to the United States and its agencies, the statutes would have expressly so stated. Accordingly, the Postal Service has not breached any duty under these State statutes and is not liable to plaintiffs.

X.

Defendant is entitled to judgment as a matter of law.

XI.

Any of the foregoing conclusions of law deemed to be findings of fact are hereby incorporated into the findings of fact.

Dated: Aug. 6, 1980.

/s/ Harry Pregerson
HARRY PREGERSON
UNITED STATES CIRCUIT JUDGE
SITTING BY DESIGNATION.

APPENDIX D.

Order Amending Opinion and Denying Rehearing.

In the United States Court of Appeals for the Ninth Circuit.

Employment Development Department, Plaintiff-Appellant, vs. United States Postal Service, Defendant-Appellee. No. 80-5694. D.C. No. CV-78-4014-HP (Central California).

Franchise Tax Board, Plaintiff-Appellant, vs. United States Postal Service, Defendant Appellee. No. 80-5700. D.C. No. CV-78-4746-HP (Central California).

Filed: June 3, 1983.

Before: SCHROEDER and REINHARDT, Circuit Judges, and THOMPSON,* District Judge.

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The opinion, dated February 10, 1983, is amended as follows:

Page 9, lines 7-9, strike the sentence: "On November 6, 1952, the state of California entered into an agreement as contemplated by § 5517" and substitute therefor the following: "The uncontroverted evidence in the record establishes that as early as 1962, withholding was provided by agreement pursuant to § 5517 between the Secretary of the Treasury and the State of California."

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*Honorable Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by designation.

APPENDIX E.

Notice of Appeal to the Supreme Court of the United States (Supreme Court Rule 10).

United States Court of Appeals for the Ninth Circuit.

Employment Development Department, Plaintiff-Appellant, v. United States Postal Service, Defendant-Appellee. No. 80-5694. DC No. CV-78-4014-HP.

Franchise Tax Board, Plaintiff-Appellant, v. United States Postal Service, Defendant-Appellee, No. 80-5700. DC No. CV-78-4746-HP.

Filed: August 12, 1983.

NOTICE IS HEREBY given that the Franchise Tax Board of the State of California, the plaintiff-appellant above named, hereby appeals to the Supreme Court of the United States from the part of the final judgment ("opinion") of the United States Court of Appeals, Ninth Circuit, entered in this action on February 10, 1983, affirming the judgment of the United States District Court for the Central District of California entered July 9, 1980, in Case Number CV 78-4746-HP(Px) that California Revenue and Taxation Code § 18817 and/or § 18818 has been preempted as applied by 5 U.S.C. § 5517. Petition for Rehearing And Suggestion That Rehearing Be In Banc filed February 24, 1983, was denied by the Court of Appeals by "Order Amending Opinion And Denying Rehearing."

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED: August 12, 1983.

JOHN K. VAN DE KAMP, Attorney General
of the State of California
EDMOND B. MAMER,
PATTI S. KITCHING,
Deputy Attorneys General
/s/ Patti S. Kitching
PATTI S. KITCHING
Attorneys for Franchise Tax Board

APPENDIX F.

Reporter's Transcript of Proceedings.

In the United States District Court, Central District of California.

Honorable Harry Pregerson, Judge Presiding.

Employment Development Department, Plaintiff and Appellant, vs. United States Postal Service, Defendant and Appellee. No. CV 78-4014-HP(Px). C.A. No. 80-5694.

Franchise Tax Board, Plaintiff and Appellant, vs. United States Postal Service, Defendant and Appellee. No. CV 78-4746-HP(Px). C.A. No. 80-5700.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Tuesday, June 24, 1980

APPEARANCES:

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Civil Division
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Washington, D.C. 20530

LOS ANGELES, CALIFORNIA; TUESDAY, JUNE 24, 1980; 2:00 P.M.

THE COURT: Call the next item on the calendar.

THE CLERK: Item 1, CV 78-4014-HP and CV 78-4746-HP, Employment Development Department v. U. S. Postal Service, Franchise Tax Board v. U. S. Postal Service.

Counsel, announce your appearances.

MR. VESELY: Jeffrey M. Vesely, Deputy Attorney General appearing for the plaintiffs.

MR. EPSTEIN: David Epstein, Department of Justice, appearing for the defendants.

MR. GOTLIEB: Lawrence B. Gotlieb with the U. S. Attorney's office for the defendants.

THE COURT: I have reviewed the various papers filed in connection with these cross-motions.

Do you wish to be heard, Mr. Vesely?

MR. VESELY: Yes, your Honor.

THE COURT: Let's start out by having you explain how you avoid — how the state would avoid the provisions of Section 215.12 of 31 C.F.R., which provides:

> "Nothing in this agreement shall be deemed to require collection by agencies of the United States of delinquent tax liabilities of federal employees or members of the armed forces."

MR. VESELY: Your Honor, there are a couple grounds that we would avoid that section.

First of all, that regulation, that section, was promulgated in —

THE COURT: Let me ask you this question: If the federal agency here was an agency other than the Postal Department — let's say the agency that we were involved with here was the United States Navy — would you be standing there today arguing that the Court ought to grant summary judgment in favor of the state agencies?

MR. VESELY: No, your Honor.

For one basic reason, and the reason is, the question of sovereign immunity would arise at that point, your Honor.

It is the state's position that because of the Postal Reorganization Act of 1970, and all of the cases that have interpreted the sue and be sued clause, which we have repeated referred to in our briefs, any sovereign immunity the Postal Service may have had, as the Post Office Department prior to the Postal Reorganization Act, has been waived.

With respect to the other federal agencies other than the Postal Service, which have not gone through a reorganization similar, it is the position of the state agencies that we would not be seeking to obtain funds through this order to withhold process, or notice of levy process.

THE COURT: The cases from other circuits that are cited — I'm looking particularly at Goodman's Furniture v. United States Postal Service, a Third Circuit case, all involved creditors other than state government, did they not?

MR. VESELY: Yes, they did, your Honor.

THE COURT: So would those cases be solid authority in support of your position?

MR. VESELY: I believe they would be, your Honor, because the simple fact is that in each of those cases judgment creditors were seeking, through state procedures, to garnish the wages of employees, in some of the cases; it's not clear in some of the others whether they were strictly employees of the Postal Service or whether they were perhaps independent contractors.

It's not clear from the facts in some of the cases. And I refer to that in my brief.

But the point of it is that these were judgment creditors.

The state taxing agencies are also judgment creditors, and which I also pointed out in my first brief.

With respect to taxes, the liabilities have become final in all cases. On the Franchise Tax Board side, the individuals filed returns showing a liability, self-assessing themselves and making no payment of the liability at that time.

THE COURT: But then don't you run smack into 215.12(a)?

MR. VESELY: The problem with this is, your Honor, if the agreement that is referred to in that section, as I pointed out in the brief again, in the supplemental brief, was the fact that the Postal Service was not a party to any agreement between the State of California and the federal government.

That regulation section covers not only Section 5517 of Title 5 of the United States Code, but it also covers Section 5520 of Title 5 of the United States Code.

5520 has a subsection (c)(4) that expressly refers to the Postal Service being within those agreements, and those agreements have to do with cities and counties with the federal government.

Now, expressly omitted from 5517 is any similar reference to the Postal Service.

The Postal Service was not a party to any agreement that preceded the enactment of 5517.

The Postal Service has even conceded this point and has instead stated that they voluntarily comply with the agreement between the stae and the federal government.

They have put forth the argument that they have promulgated regulations that in an indirect manner will cause them to be able to use 5517 to create a conflict between federal statutes and state statutes and thus use the supremacy clause argument.

I cannot see how the promulgation of a regulation by the Postal Service can be used to bootstrap, when it is expressly limited, expressly not included within 5517.

One other point with respect to 215.12 is that we do not believe that that agreement that is referred to there — the agreement has to do with only payroll holding. That's all that agreement has to do with. That has nothing to do with the delinquent tax liability, and the language of that section does not state that all delinquent tax liabilities cannot be collected from the Postal Service, or from whoever there is.

It just says this agreement here does not authorize it.

I think it has to be very closely looked at.

We are not suing under the agreement. We are suing for violation of two state statutes, Revenue and Taxation Code Section 18818 for the Franchise Tax Board and 1757 of the California Unemployment Insurance Code for the Employment Development Department.

These sections, 5517 of Title 5 and 215.12, or any of the other subsections there, have no applicability to this proceeding because the Postal Service is not included within that statute.

THE COURT: All right. Fine. Thank you.

Mr. Epstein.

The primary argument is that the Postal Service is not included within 215.12(a).

MR. EPSTEIN: Well, your Honor, we feel that 5517 is clearly controlling in this case, as we briefed that argument.

The agreement that counsel referred to is an agreement between the Secretary of the Treasury and the State of California and —

THE COURT: I don't have the text here before me.

I do have it here, yes.

You are referring specifically to what?

MR. EPSTEIN: I'm referring to the paragraph marked 1 where it says:

> "The head of each agency of the United States shall comply with the withholding provisions of the State of California income tax law . . ."

and it is pursuant to this overall agreement that the —

THE COURT: You are looking at what page of the brief now?

MR. EPSTEIN: This is Exhibit C, the Healy affidavit, which was attached to the defendant's motion for summary judgment and attached to the Healy affidavit is a copy of the agreement.

THE COURT: I have a copy of 5517 before me. It is page 9 of the government's brief filed on April 30, 1980.

MR. EPSTEIN: And the way it worked, pursuant to the statute, is that the Secretary of the Treasury entered into the agreement on behalf of these agencies and then each agency, like the Postal Service, incorporated the provisions of that agreement into its regulations and handbook material and that is what the Postal Service did.

Now, I think it is pretty clear that the Postal Service considers itself bound by the provisions of this agreement and evidently the State of California and the Postal Service had years of dealing under this agreement, pursuant to which the state taxes were withheld.

The only question that I think maybe is worth discussing is not whether 5517 is applicable, but the problem that arose after the creation of the Postal Reorganization Act when, under 410 of the statute, provisions like 5517 were exempt from the Postal Service. When the Act was created the intent was to remove the labyrinth of laws that had previously been in effect, to recodify only Title 39; in other words, just the postal laws and then eliminate the nonpostal laws, but allow, through certain savings provisions, the discretion

in the Postal Service to retain the rules and regulations which it felt would promote the efficient operation of the Postal Service.

And pursuant to these provisions, and 410, and other savings clause provisions, the Postal Service, in its discretion, decided to retain this regulation that was in its handbook and manual allowing for the continued deduction of state taxes.

But I don't think there is any question about the applicability of 5517 to the Postal Service.

Now, the way we regard this case, this case is not a continuation of the sue and be sued cases which went before. In those cases there was a question of subject matter jurisdiction under the sue and be sued clause of the Postal Act.

We have not raised that as a defense in this suit because of constitutional and statutory prohibitions that otherwise exist which we say bar any action by the State of California here.

And the state keeps trying to bring this back to make it a continuation of the sue and be sued cases.

We think this case is clearly distinguishable.

This case involves administrative levies, not judicial garnishments.

This is a first attempt —

THE COURT: How do you distinguish this situation from that in Goodman's Furniture v. United States Postal Service and the other circuit opinions cited therein?

MR. EPSTEIN: There are a number of distinctions, your Honor.

First of all, as I said, as far as I know only the sovereign immunity defense was raised in those cases.

We are not raising that defense here. We are basing this case more on the merits. And as we briefed, we feel there are a number of arguments which arise pursuant to the statute and the Constitution which bar this action.

Also, this is not a judicial garnishment suit. This is an administrative levy. As far as I know —

THE COURT: What difference should that make?

MR. EPSTEIN: I think it makes a big difference, your Honor, because as far as I know there is no determination of liability in these cases.

THE COURT: In other words, had the state reduced its claim to judgment and levied on that judgment you wouldn't be standing there. Is that what you are saying?

MR. EPSTEIN: That's right, your Honor. We are honoring judicial garnishment and have changed our regulations to honor them.

In judicial garnishments there has been a determination of liability as to the debtor. Here there has been, as far as I know, no determination of liability. And we think, because of the open-ended aspect of it, which would give rise to state imposition of any administrative levy, it's on the discretion of the Postal Service.

There is a clear interference with a government function here, and 5517, as we have believed, has a clear prohibition against the federal agency serving as a collection agent.

That was not the intent of the statute and —

THE COURT: Where is that in the section?

MR. VESELY: That is in the agreement.

MR. EPSTEIN: That is in the agreement. And it is also in the provisions of 5517.

THE COURT: (a) or (b) or what?

MR. EPSTEIN: I think it is (b).

This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States, or its employees, to a penalty or liability because of this section.

THE COURT: If you examine that closely — well, the statute that we're concerned with imposes a burden on the

United States that would be equivalent to the burden that the statute would impose on a private employer, would it not?

MR. EPSTEIN: It would be similar.

THE COURT: Similar. All right.

MR. EPSTEIN: Except, I think there are distinguishing factors because of the setup of the Postal Service. The Postal Service is a nationwide corporation that has post offices throughout the country.

This, of course, would open up and would apply only in California. But, first of all, if this procedure were allowed it would apply to the United States, or could be interpreted as applying to the United States and other federal agencies and could subject the Postal Service to whatever inconsistencies there are in state procedures across the country, contrary to the purpose in 5517, which was to limit the federal functions of withholding only.

And that's why there is express prohibition against a penalty in the statute as well as in the agreement itself.

THE COURT: What you are saying is, it's burdensome because of the fact that we may have fifty states and each state has different requirements and the Postal Service would have to keep up with all those requirements. Is that what your argument is?

MR. EPSTEIN: That's correct.

THE COURT: What about the next clause which subjects the United States or its employees to a penalty or liability because of this section? Are you claiming that a penalty or liability is being imposed?

MR. VESELY: Yes, your Honor.

THE COURT: How?

MR. VESELY: We feel that whatever has been held is the limit of the federal function. This seeks —

THE COURT: Tell me what is the penalty?

MR. EPSTEIN: I would view it in a broad sense. I would view it more under the liability that California is seeking —

THE COURT: So you are saying there is no penalty. Then you want to look at liability.

MR. EPSTEIN: I would seek liability because they are seeking to hold us liable for the unpaid taxes. And that was not the intent of this provision.

We are only serving a withholding function only, and as part of promoting the federal-state cooperation in tax matters, and to facilitate the collection of revenues this agreement was entered into but not, to carry it one step further, or even further than that, to subject federal agencies to this kind of liability and determination every time a debtor is adjudged to be liable for unpaid taxes.

We regard that as a burden on the federal function.

THE COURT: This issue, I take it, has never been resolved by any court?

MR. EPSTEIN: That's correct, your Honor. And we also asked the State of California in our interrogatories whether they had assessed these levies against other federal agencies and they said only the Postal Service.

THE COURT: And the Postal Service will honor a judicial garnishment?

MR. EPSTEIN: A judicial garnishment, and it's in the manual for federal court orders, but I understand a directive has come out which also applies to state court garnishment orders.

THE COURT: Well, Mr. Vesely, then why doesn't the state then proceed by way of a judicial garnishment?

MR. VESELY: There is no requirement under any tax law that the state or federal government, IRS proceeding, have to get a state court judgment or any kind of a judgment. Summary collection procedures have been upheld from the Phillips v. Commissioner case, which I cite in my brief,

and by the United States Supreme Court, and it has been upheld in a number of Ninth Circuit cases — Randall for one, Bomher v. Regan, Kelly v. Springett.

There are all these cases in California where the summary collection procedures, without a state court judgment, is not required.

The policy behind it is the prompt collection of taxes, your Honor.

THE COURT: Well, I know that is important.

What about the provision in 5517(b) about subjecting the United States to a liability?

MR. VESELY: I don't wish to repeat my previous point, your Honor, just the fact though, first of all, is that 5517 states that this section does not give the consent.

Read the language there. It does not give the consent to this kind of an action.

We are not suing under 5517, once again. I want to reemphasize that.

But, secondly, the point of it is that we are not asking anything further of the Postal Service than to turn over property that was belonging to the taxpayer in question.

Now, the fact that they didn't turn over the property at the time of the levy and the orders to hold were served upon them, now it's going to have to turn over property that will come from the Treasury, or wherever it will be coming from.

That seems to be a classic bootstrap argument in itself, your Honor.

I believe what we have here is, we're not seeking to impose a penalty upon the Postal Service at all.

In fact, there is one point I wish to make to your Honor, that one of the tax debtors involved in this action, it was a Mr. Sedberry for the Franchise Tax Board. There was an order to withhold, to serve with respect to him, for approximately $5,000. It's in the records and in the briefs.

He has recently paid his liability so that if any kind of a judgment were to be rendered in favor of the Franchise Tax Board it would be our position that judgment should be reduced by the $5,000 amount which Mr. Sedberry's amounted to.

THE COURT: What is the balance of his tax liability?

MR. VESELY: His tax liability is clear and we don't seek the Postal Service to pay anything off. There is no liability there. We are asking for nothing more than the amounts that were owed to those employees and the independent contractors.

THE COURT: How many people does that leave you then?

MR. VESELY: It leaves me with — well, two on the Franchise Tax Board side that I know for sure. They represented that Mr. Norwood was not an employee at the time. We were not aware of that. Our information was that he was employed. So that would leave us with two tax debtors on the Franchise Tax Board side.

McCune is on the Employment Development side. And there were two tax debtors on that side. And now there is only one.

We have no reason to question what they are saying about not owing any money at the time. Our information was that —

THE COURT: So the case against Lake and Norwood is moot.

MR. VESELY: Also with respect to Mr. Sedberry on the Franchise Tax Board side. He has paid his liability. We aren't seeking any further money.

THE COURT: So we are left with whom now?

MR. VESELY: McKinley Herd, H-e-r-d, Joseph Stovall, S-t-o-v-a-l-l.

The one point that I wish to make though with respect to this administrative levy versus the judicial garnishment,

your Honor, is that it is a well-settled and long-standing rule of law, not only with respect to state tax liabilities but also with respect to federal tax liabilities, that summary tax collection procedures are constitutional. There is no reason to go in and get a court judgment. It is not necessary. There absolutely is no reason here for us to have to do that.

THE COURT: Why does the Postal Service make a distinction in its own mind, Mr. Epstein, between a judicial garnishment and an administrative garnishment?

MR. EPSTEIN: Well, your Honor, as I stated, there are prohibitions that arise under this situation, with administrative tax levies, that did not exist in the judicial garnishment cases because the administrative levies bring into clash the federal and state schemes, clearly by the prohibitions and —

THE COURT: Why do they bring up any more of a clash than a judicial garnishment?

MR. EPSTEIN: The judicial garnishments, as far as I know, were not involved in the 5517 agreement. These suits involve employees of the Postal Service which are clearly covered under the agreement. In those other cases sovereign immunity was the only defense that was raised and this agreement was not relied on.

THE COURT: Why wouldn't a judicial garnishment fall within the provisions of 5517(b)?

MR. EPSTEIN: I'm not sure of that, your Honor, why it was not treated in those cases. That issue did not arise as far as I know.

The plaintiffs in those cases were not states. That is what creates the clash here.

I think that is the distinction that you are looking for. It's because the State of California is the plaintiff and because it's the State of California, that brings into play directly the conflict —

THE COURT: I mean, is the clash more obnoxious because it is brought on by the state —

MR. EPSTEIN: Yes, your Honor.

THE COURT: — vis-a-vis the clash brought on by private individuals?

MR. EPSTEIN: Yes, your Honor, because it clearly falls within the supremacy clause that disallows state statutes to interfere with federal functions.

There are two prohibitions here. First, there is an actual conflict here, your Honor, an actual conflict that —

THE COURT: Let's say Sears & Roebuck, through a judicial garnishment, serves the Postal Service. That's less onerous than having the State of California come in with its levy against the Postal Service?

MR. EPSTEIN: Yes, your Honor, because there you would only be talking about individual judicial garnishments brought by a private party. That issue had already been litigated.

Here you have an entirely different situation. You have a state instrumentality that is seeking to use its state functions in contravention of a comprehensive federal scheme that was established and under actual conflict —

THE COURT: But if the state took an additional step and used its own judicial process, then that would eliminate all obnoxious element in the procedure; is that what you are saying?

MR. EPSTEIN: That is correct.

THE COURT: Does that make sense?

MR. EPSTEIN: I think it makes sense, your Honor, because I think there is a big distinction between an administrative levy and a judicial garnishment.

In a judicial garnishment order there has already been a determination of liability.

THE COURT: Well, in an administrative levy isn't there a self-determination of liability?

MR. EPSTEIN: That may be, your Honor, but that could give rise to due process questions. That could poten-

tially subject the Postal Service to liability in other suits, in suits by employees or contractors.

I think it's the frustration and the burden on the federal scheme that led to the prohibitions in the federal statutes. That is exactly why the statute was intended to be limited to withholding only and not get states involved in making the federal agencies collection agencies because that would —

THE COURT: But the federal agencies are collection agencies if the collection is performed pursuant to a judicial garnishment.

MR. EPSTEIN: That is true, your Honor, but you have got a private party — it's a one-kind-of-a-thing, with an employer bringing a judicial garnishment for "X" and not dealing with a state entity that brings in this clash between state and federal, where you have got one power, one instrumentality, trying to prevail over a scheme that has been established and under the supremacy clause —

THE COURT: When a private individual comes in with a judicial garnishment you have that private individual seeking to enforce a state writ. So you have the same clash here as this.

MR. EPSTEIN: Well, under the cases that we have cited in our brief, aside from —

THE COURT: Logically, really, do you see any difference in all this?

MR. EPSTEIN: I do, your Honor, under the case law.

THE COURT: Forget about the case law. Let's just talk about logic and common sense.

MR. EPSTEIN: I think this is too open-ended. I don't think there is any way that a federal agency could deal with this kind of a situation. They would not know at this point what this would entail and how this would affect their operations and what this would subject them to. It's hard to generalize as to the impact of the particular burden that it would have on the operation.

THE COURT: In other words, there is less likelihood of volume of these writs, or whatever you want to call it, forgetting the state, forgetting the federal government, if the state is required to go through its own judicial machinery?

MR. EPSTEIN: I would think so, your Honor.

THE COURT: It makes it tough on the state, and in some states the employee just then would like the power to mail out these letters. He would have to go down to the courthouse and follow whatever procedure the state establishes there and get his judicial garnishment which, of course, doesn't require that the matter be reduced to a judgment.

MR. EPSTEIN: It is my understanding that in the judicial garnishment, most of the judicial garnishment situations, there has been a determination of liability and that is not true in the administrative levy sense.

THE COURT: Is a determination of liability necessary also in order to get a state judicial garnishment?

MR. EPSTEIN: That is my understanding.

MR. VESELY: Excuse me.

THE COURT: Did you hear my question? Is a state judicial determination of liability necessary in order to get a state judicial garnishment?

MR. VESELY: No, it isn't, your Honor. The point of it is that —

THE COURT: You just go down to the clerk's office with the affidavits and post whatever bond they want and you get your writ and you can run over to the Postal Service and serve them.

MR. VESELY: The point of it is that there is no need to go —

THE COURT: Is that the way it could work?

MR. VESELY: We don't do that very often — that is the point — because we don't have to do it.

THE COURT: I just asked you if that is the way it would work. I haven't practiced law in the state courts for fifteen years.

MR. VESELY: There are procedures under the Revenue and Taxation Code where we go down with a final liability, such as liabilities like this, and these taxpayers have had the opportunity to contest this, these liabilities, and as I said on the Franchise Tax Board side, and also I think partially on the Employment Development Department side, these were self-assessed where the taxpayers actually wrote these tax dollars down on their reports, or returns, and said, "This is what I owe but I'm not paying you now," so they never paid. They have a period of time to protest —

THE COURT: I understand that.

MR. VESELY: On the revenue and taxation side there is a procedure for going down and getting a certificate of judgment, which is nothing more than a lien, which can then be filed in various counties and whatever. There are number of various remedies available to the state agencies. They are all cumulative. You can use any one which does not foreclose you from another one.

The Franchise Tax Board decided to use the order to withhold.

THE COURT: And one that would be easily attainable would amount to a judicial garnishment?

MR. VESELY: We could file suit for the tax in court. That is one of the procedures that is available, if we were so inclined. We do that more often maybe with an out-of-state defendant where we have to get a judgment for this state for the out-of-state. That is the only way we would ever use it.

All of the procedures aren't equal. Once the liability becomes final under California Code of Civil Procedure Section 722.5 it says we have the entire status of a judgment

creditor, these agencies have status of judgment creditor, they have all the remedies available to them of a judgment creditor at that time and they can do what you are saying. But they are not required to do one or the other. They can use any one of these, they can use them in combination or to the exclusion, or whatever they want to. And the Employment Development Department can use its levy or warrant or by liens or use any of the Franchise Tax Board remedies of collection.

The whole point of this is that before any of these various collection devices are used the liability is a final liability. The party has had an opportunity to contest it and the party has a further opportunity, once the taxes are paid, to then go through the claim for refund and sue for refund route.

That procedure has been upheld to be constitutional and there is absolutely no difference here between a state court judgment garnishment and these administrative levies, as counsel would have.

There is one last point I would like to make, if I could.

This constant referral to interference with the functions of the Postal Service. It is interesting to me to note that although the Postal Service states that they are not relitigating the sue and be sued clause, this is an identical argument that was put forth in the sue and be sued clause cases and it was rejected in a number of cases.

I referred to that in my brief. I see nothing different in this case.

THE COURT: Your position in a nutshell, Mr. Vesely, is that the Postal Service is not the beneficiary of sovereign immunity and, therefore, is amenable to sue as any private individual or private entity would be.

MR. VESELY: Yes, your Honor.

THE COURT: That is the bottom line.

MR. VESELY: That is it.

THE COURT: And the bottom line to your argument, Mr. Epstein, I take it, is that — and correct me if I am

wrong — that under 5517(b), the procedure followed by the state, the administrative levy process subjects the United States to a liability.

MR. EPSTEIN: Your Honor, I would like to add, in reference to Section 5517 the contract and also the federal regulation. I did not mention that. It is in my brief, but I did not mention the (b) part, which also clearly applies here.

It says:

> "Nothing in this agreement shall be deemed to require collection by agencies of the United States of delinquent tax liabilities of federal employees . . . or members of the armed forces."

I cited the (b) part but there is also the (a) part which contains the —

THE COURT: You are talking about 215.12?

MR. EPSTEIN: 215.2.

THE COURT: 215.2(a)?

MR. EPSTEIN: Yes, (a). And also the express provisions of the Section 5517 contract, which bars collection to require the —

THE COURT: Well, the Postal Service isn't asserting it is the beneficiary of sovereign immunity; correct?

MR. EPSTEIN: Yes. But it is asserting immunity from state regulation.

THE COURT: What is the difference between that and sovereign immunity?

MR. EPSTEIN: That argument is a constitutional argument which is a corollary to the supremacy clause.

It has nothing to do with jurisdiction or lack of jurisdiction, over the subject matter as conferred or not conferred by a federal statute.

This is a constitutional-based argument which prevents interference by states.

There is a federal immunity from this kind of state regulation or taxation. It's recognized by many Supreme Court

cases which are cited in our brief and I have to emphasize against the distinction between the state trying to impose this and some other party.

The case law clearly puts the federal-state clashes in the context of the supremacy clause, and this immunity — this corollary, which emanates from the supremacy clause, I think makes considerable difference in this case.

The State of California talks about the propriety of summary proceedings. That may be true with respect to private parties, but when you're talking about this kind of procedure, as it affects a federal agency, you are getting in another area that rises to constitutional dimensions.

And here you don't even have to reach the immunity argument because you have already got an actual conflict on the provisions of 5517 and the state statutes.

But then you have an additional argument on the immunity because this clearly falls within the kind of immunity that federal instrumentalities were to be protected against, and it is not to be confused with the immunity from sue and be sued.

That is not an issue here. We have not raised that.

THE COURT: All right. Do you want to close. Mr. Vesely?

MR. VESELY: Yes, your Honor, just one short point.

The only point that I would like to reemphasize is with respect to this 5517 section and with respect to 215 of the C.F.R.

Under both circumstances, your Honor, I think it must be very closely looked upon that those sections, along with Section 410 of Title 39, which expressly states which section shall apply to the Postal Service, and does not include 5517, but does include 5520 with respect to city and county taxes and 5520 is one of the sections, along with 5517 and 5516 which go into giving the authority for promulgating Section 213 of the C.F.R.

5520(c)(4) refers to the Postal Service expressly being a party to those agreements with respect to city and county taxes, but 5517 does not have such a proviso in it.

Why 5517 was not included within the listing in 410, I know there are a lot of sections being thrown around here, but —

THE COURT: The bottom line of your argument is that 5517 does not apply.

MR. VESELY: It does not apply to this action, and the only reason it is being brought into this whole thing, in our view, is to attempt to create a conflict between federal and state statutes where there is no conflict.

5517 does not apply to this case. There is no conflict between statutes now. So, therefore, any supremacy clause argument is just inappropriate.

My other arguments I have put forth already, your Honor, about the various things and have been handled in the briefs, I believe, and I have nothing further.

Thank you, your Honor.

THE COURT: All right. One last word?

MR. EPSTEIN: Your Honor, this is a technical argument, but the 5520 that counsel refers to, there is an easy explanation as to why that is specifically mentioned, and that is because the Postal Service — that is a subsequent statute to 5517 which the Postal Service had long been complying with and it was not necessary to reenact 5517 into 410 because it was the practice of the agency, as recognized in its regulations, to comply with it, and 5520 was added. And what you have is, you view the provision in its total, 5517 and 5520 both viewed the same way would make no sense to have it one way for city taxes and another way for state taxes.

And the Braun affidavit, which is attached to our supplemental motion, clearly goes into the transition between the old Postal Act and the new Postal Act which gave the

Postal Service the discretion to retain those statutes which it felt — and those rules and regulations which it felt — would promote the efficient operation of the Postal Service.

5517 is a clear example of one that would promote the efficient operation.

It is of assistance to the state to have this withholding scheme taking place, and it was always the intent of the Postal Service to retain this, and as it appears in the manual and handbook provisions. So it is there. It was there under the old statute, it is there under the new one.

I also have difficulty in following plaintiff's argument as to why it does not feel that 5517 is involved in this case. The scheme was a relationship, contracts to be entered into between the Secretary of the Treasury and states on behalf of federal agencies and the Postal Service then incorporated compliance with this agreement in its own regulations and manual and handbook provisions — long operating practice relationship between the state and the Postal Service in this regard.

Clearly, 5517 is in this suit as a direct issue and can't be ignored, and the express language of that provision bars the enforcement action that the plaintiff is seeking here.

And, finally, I just want to emphasize again that because it is the State of California there are essential issues which arise here of constitutional dimension which prohibit the actions that the plaintiff is seeking.

THE COURT: All right. The matter will stand submitted.

MR. VESELY: Thank you, your Honor.

MR. EPSTEIN: Thank you, your Honor.